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NO. 668

JOHN A. BROSS, ET AL.,
Petitioners,

v.

BOARD OF COUNTY SUPERVISORS
OF FAIRFAX COUNTY, VIRGINIA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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BOARD OF COUNTY SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

John A. Bross and others* pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered on June 11, 1963, refusing an

* Joanne B. Bross, Walter T. Ridder, Marie W. Ridder, Evelyn H. Southall, George Southall, Talbot W. Jenkins, Anne C. Jenkins, Edward P. Morgan, Katherine B. Morgan, Michael L. LeJeune, Margaret W. LeJeune, Floydine D. Miscampbell, James Miscampbell, Jr., John W. Hanes, Jr., John R. Bird, W. Ross Rowland, Jr., George Nixon Summers, John C. Laylin, Scott Seegers, Kathleen Seegers, Mollie Ray Carroll, Lewis Marden, Manning Gasch, Joseph H. Brogden, June H. McKnight, Bonnie Beall Foster and C. B. Wood are also Petitioners.

appeal from the final decree entered in favor of Respondents** in the Circuit Court of Fairfax County, Virginia, on October 19, 1962.

OPINIONS BELOW

No opinions were written by either the Supreme Court of Appeals of Virginia or the Circuit Court of Fairfax County, Virginia.

JURISDICTION

The Circuit Court of Fairfax County, Virginia, dismissed Petitioners' suit by decree entered October 19, 1962 (Appendix A, *infra* p. 13-A); the Supreme Court of Appeals of Virginia refused an appeal by order entered June 11, 1963 (Appendix A, *infra* p. 21-A). An application for rehearing was filed with the Supreme Court of Appeals on July 10, 1963 (R. 99-107), and said application was denied by order dated September 11, 1963 (Appendix A, *infra* p. 22-A).

QUESTIONS PRESENTED

1. Does not the 14th Amendment prohibit a county from rezoning land at the request of a single landowner without a substantial change in conditions, contrary to the county's master plan of land development and contrary to the plans

** Hugh D. Auchincloss and board members William A. Moss, A. Claiborne Leigh, Stuart T. DeBell, John P. Parrish, James Keith, Anne Wilkins and Robert C. Cotten are also Respondents

and desires of neighboring jurisdictions and of cognizant regional planning agencies?

2. Does not the rezoning of one tract of land to a less restrictive use classification than that of surrounding parcels violate the 14th Amendment when: *i*) the rezoning is not in accordance with the local master plan of land development and *ii*) no reasonable grounds of distinction are given between the land rezoned and the surrounding parcels?

3. Does not the due process provision of the 14th Amendment require that a local rezoning hearing be a fair one with the decision based only upon evidence presented at the hearing and upon the statutory recommendation of the planning commission?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Section I of the Fourteenth Amendment to the Constitution of the United States, containing the due process and equal protection clauses as set forth below:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Virginia Code Sections 15-846 and 15-847 of Article 2 and Sections 15-859 and 15-860 of Article 3, all appearing in Chapter 24, Title 15 of the 1950 (Michie) edition of said code. These provisions are presented in Appendix C, *infra* p. 1-C.

STATEMENT

How Federal Question Is Presented

The Federal question sought to be reviewed was raised in Paragraph 11 of the Amended Bill of Complaint filed in the Circuit Court of Fairfax County on September 7, 1962, (Appendix A, *infra* p. 4-A), was preserved in Paragraph 11 of the Second Amended Bill of Complaint, filed on September 13, 1962 (Appendix A, *infra* p. 9-A). The Federal question was passed upon by the Circuit Court of Fairfax County by decree entered October 19, 1962 (Appendix A, *infra* p. 13-A), and by the Supreme Court of Appeals by order entered June 11, 1963 (Appendix A, *infra* p. 21-A).

Statement of Facts

From the Piedmont Hills the Potomac River descends to the Nation's Capitol through one of the most beautiful gorges in America. On the Virginia side, bluffs which have been called the Palisades rise sharply for over 100 feet. On the Maryland side of the river, islands skirt the shore, backed by a narrow plain and a gradual rise to the heights beyond.

This gorge of the Potomac has been preserved in the main as George Washington knew it. Both sides are heavily wooded from Key Bridge westward to the Loudoun County line. Upstream from the Key Bridge area, the only high buildings visible from the Virginia side are Sibley Hospital (eight stories) in the District of Columbia, and the Army Map Service Building (five stories) in Montgomery County, Maryland. Both are set back more than half a mile from the river. Looking toward the Virginia side, no other buildings are visible.

This preservation of the natural beauty of the Potomac River Gorge has been no accident. A large part of both shores is Federal park land. On the Maryland and District of Columbia side, Federal lands including a portion of the George Washington Memorial Parkway flank the river under the heights from Key Bridge upstream for many miles. Through this strip of land the old Chesapeake and Ohio Canal, now a National Historic Monument follows the river from Georgetown to Cumberland, Maryland. On the Virginia side, the George Washington Memorial Parkway administered by the National Park Service, follows the brink of the Palisades all the way from Key Bridge to Chain Bridge. The parkway is landscaped and provided with scenic over-looks giving panoramas of the river valley. Above Chain Bridge this parkway loops inland for a couple of miles leaving an area along the river in private ownership, called the "island." (See map, Appendix B.[1]) This "island" is occupied by a number of handsome and expensive single-family dwellings situated on lots ranging from one to 46 acres.

In the middle of this "island" area, on a forty-six acre tract called "Merrywood," within sight of the Capitol building itself and upon the crest above the river just within the boundaries of Fairfax County, Virginia, developers propose to erect a number of twelve-story, high-rise apartment buildings containing approximately 1030 dwelling units. If constructed, they will loom on the horizon above every building in the area except the Washington Monument, and will be visible both up and down stream from both sides. It is the validity of the purported rezoning of this tract for apartments by the Fairfax County Board of Supervisors that is contested herein.

[1] The map in Appendix B is not a part of the record and is used only for explanatory purposes in connection with this petition.

The land on the Maryland side of the river opposite Merrywood and inland from the Federal property along the bank has been zoned for single family dwellings by Montgomery County; high buildings are prohibited. Arlington County has zoned all its land along the Potomac River above the Rosslyn commercial area exclusively for single family residences. This includes all the Arlington County land within the "island" area and less than 600 yards downstream from Merrywood.

Fairfax County, the fourth jurisdiction involved in the protection of the scenic Potomac River gorge, for more than twenty years followed the identical policy of its neighbors by prohibiting anything but single-family residential developments on the Palisades: In 1941, again in 1956, and again in 1959, the County Board of Supervisors adopted comprehensive zoning maps of the whole county, zoning the Palisades for single-family use. In 1959, the Board adopted a residential master plan calling for single-family development in the Palisades area. It elected a representative to the National Capital Regional Planning Council which in 1961, in conjunction with the National Capital Planning Commission, produced a master plan for the development of the entire National Capital Area through the year 2000. This plan projects continued low density development along the Potomac Gorge.

Under the 1941 Fairfax County Zoning Ordinance high-rise apartments were prohibited by a height restriction. Garden apartments were permissible in residential districts upon special use permit granted by the Board of Zoning Appeals. Under a revamping of the 1941 ordinance known as the "Erechill Amendment," adopted in 1956, apartments were permitted on a special use permit granted by the Board of County Supervisors. High-rise apartments were still forbidden under the general height limitations.

Effective September 1, 1959, the "Pomeroy" zoning ordinance was adopted. It established for the first time an apartment zoning classification known as RM-2, with height limitations of 35 feet or approximately three stories. High-rise apartments were still prohibited by the height limitation.

In mid-year 1960 the Planning Staff of the County produced an apartment study recommending the creation of a high-rise apartment district. It recommended the adoption of criteria to guide the Planning Commission and Planning Staff in future apartment rezonings and recommended fixed sites, which did not include Merrywood for high-rise apartment districts. (Transcript of testimony before Circuit Court of Fairfax County, Vol. II, p. 233. Hereafter cited as "Tr.")

On September 19, 1960, the Board amended the zoning ordinance to provide for an RM-2H zone for high-rise apartments, but refused to designate any ground for that purpose. It decided that the RM-2H zoning classification would be applied only upon application on a "first come, first served" basis. At the same time the Board also adopted the recommended criteria for determining where apartment use (both garden and high-rise) would be permitted.

In 1959, the member of the Board of Supervisors who represents the Dranesville Magisterial District in which Merrywood is located, A. Claiborne Leigh, campaigned and was elected on a platform pledge to oppose construction of apartment houses in his district. As of early 1962 no land had been zoned for apartment house use, high-rise or otherwise within said district. This district is developed in single-family residential uses. Commercial uses are mainly confined to the McLean and Tyson's Corner areas, approximately 3 and 5 and one-half miles respectively from Merrywood.

Such was the situation when real estate developer Sheldon Magazine, automobile dealer William Page, Fairfax County Sheriff John E. Taylor and attorney Lytton H. Gibson formed a syndicate to purchase from Hugh D. Auchincloss, the scenic property known as Merrywood. The option provided for the purchase of Merrywood for about $650,000 upon the rezoning for three 17-story apartment houses. The rezoning for the apartment houses was to be undertaken by the syndicate. If they were successful then the land alone would be worth an estimated $2,000,000, and, once built, the apartments high above the Potomac would produce millions for their owners over a period of years.

As of the date of the formation of the Merrywood syndicate, the RM-2H (high-rise apartment) zoning classification had been applied to only one area in Fairfax County: a tract partially owned by one of the members of the Board of Supervisors located near Seven Corners, five miles from the Merrywood tract. There had not yet been a comprehensive approach to high-rise zoning. The new zoning classification was still subject to the policy of September 19, 1960, of zoning on a "first come, first served basis." The apartment criteria were still in effect.

The syndicate was put together in 1961 following a telephone call to Mr. Gibson from Mr. Auchincloss. Page was brought in because of his financial resources; Sheriff John E. Taylor was brought in as a real estate broker.

Subsequent to the rezoning action of the Board of Supervisors, Gibson was asked if it was a mistake to have invited the Sheriff into the deal. He stated that it definitely was not a mistake, it was a big help. He was asked how. He replied, "Politically, that's how. He was able to communicate with the Board members."

When questioned about his activities, Sheriff Taylor reported that he discussed the rezoning with two supervisors, DeBell and Parrish, whom he asked, "To keep an open mind." Sheriff Taylor also spoke to two members of the Planning Staff, Messrs. Burrage and Payne. (Tr., II:251, 352.)

Before the Board hearing, Supervisor A. Claiborne Leigh, representing the Dranesville District and who owned 23 acres of ground situated three quarters of a mile from Merrywood, paid a visit to Supervisor Anne Wilkins at her home and asked her if she would vote for the project. Mrs. Wilkins testified that he offered to exchange his vote on some future issue for her vote in favor of the Merrywood rezoning. Mrs. Wilkins rejected the proposal and voted against the application.

Also prior to the rezoning hearing, Supervisor Leigh found it necessary to borrow money so that he could purchase 3 acres of land to provide access from his 23-acre parcel to a public road. He applied to the Falls Church Bank, among whose directors are syndicate members Taylor and Gibson, for a $20,000 loan to help finance the purchase. The property was appraised by Sheriff Taylor. The bank concluded that it could loan no more than $15,000. Following the rezoning of Merrywood, Leigh was able to conclude his transactions with the Falls Church Bank. On the same date as the decision of the County Board rezoning Merrywood (April 18, 1962) Leigh filed an application to rezone his own property from one-acre residential lots to one-half acre residential lots. His application was subsequently granted by the Board.

To say that there was a storm of protest at the application to rezone Merrywood is an understatement. More than 2,500 persons signed a petition in opposition. The

County Board of Arlington County registered its opposition and sent a spokesman to the Fairfax Board hearing. The National Capital Planning Commission, which by Federal statute has planning responsibilities in the District of Columbia and its environs including "preservation of the scenery of the Gorge and Great Falls of the Potomac," opposed the rezoning. The Fairfax County Planning Commission pursuant to Virginia statutory requirement met and recommended against rezoning. Many citizen associations, conservationists and other groups sought denial of the rezoning application.

The Petitioners Bross and others, who live in close proximity to Merrywood, filed written protests against the rezoning. The Petitioners John E. and Joanne Bross are immediate neighbors to Merrywood having a common boundary of some 1500 feet. The Southalls, Ridders and Morgans live next up the river in that order. The LeJeunes, live down the river from Merrywood and the Jenkinses and Miscampbells live across Chain Bridge Road from the property.

After a protracted hearing, the Board of County Supervisors upon the motion of Supervisor Leigh, voted 5 to 2 to grant the application for rezoning of the property. The Board made no finding that the apartment criteria, which it had previously adopted, had been complied with. In fact, in enunciating the Board's decision, none of the majority made any reference whatsoever to any of the criteria or any effort to justify their decision in terms of them. Other than the general conclusion expressed by several Supervisors that Merrywood is a "good site" for apartments, the Board's decision sets forth no rationale.

No need was shown for the proposed development. The Tysons Corner area, five minutes west of McLean, is plan-

ned to include over 150 acres of apartment housing. According to members of the Planning Staff, the apartment housing in this and adjacent area will take care of the needs of all of the Dranesville District for the foreseeable future.

Supervisor Leigh did not disclose at the hearing the facts about his own rezoning, his bank loan application or his attempt to trade votes with Mrs. Wilkins. The applicants failed to mention the role of Sheriff Taylor who had contacted the Supervisors and two Planning Staff members. These facts were disclosed subsequent to the hearing.

Following the decision of the County Board granting the rezoning, the Petitioners filed suit in the Circuit Court of Fairfax County challenging the validity of the action taken and requesting a declaratory judgment that said action was void and that the Merrywood tract continued to be zoned for single-family residential use only. After granting motions to strike and exclude evidence as to certain allegations not material here, the case was tried upon the remaining allegations of the bill of complaint.

As of the date of the hearing in court, the Board of County Supervisors had acted favorably upon only three applications to rezone property for high-rise apartments:

1. The previously mentioned tract near Seven Corners on Route 7, part of which was owned by a member of the Board;

2. The Merrywood tract;

3. A parcel located at Tysons Corner, so zoned after the Merrywood rezoning and after a comprehensive neighborhood plan had been worked out and recommended by the Planning Commission.

The Board has still not adopted a high-rise apartment plan for the County, nor has it adopted one for the Merrywood area. It continues its policy of rezoning upon individual applications upon a "first come, first served" basis.

At the trial, an expert witness called by the defense testified that the properties of the Petitioners, all of which are located in close proximity to the Merrywood tract and within the "island" area, were identically situated with reference to transportation, utilities and desirability for apartment-house rezoning. However, the action of the Board affected Merrywood only.

Maps introduced into evidence showed that the attempted rezoning of the Merrywood tract amounted to the creation of a new zone rather than a change of district boundary, since the only property in the entire county which had been zoned for high-rise apartments was the aforementioned tract at Seven Corners miles distant.

Despite the evidence and testimony outlined in the statement, the Court ruled from the bench that the attempted rezoning was valid and dismissed the Petitioners' bill. Petitioners herein thereupon vainly sought an appeal from the Virginia Supreme Court of Appeals. A petition for rehearing was also denied on September 11, 1963.

On November 16, 1963, the United States Department of Interior filed a notice in the U. S. Federal District Court for the Eastern District of Virginia of the taking of a scenic easement in Merrywood which would prohibit the high-rise apartment development, but permit single-family use. However, even if the Interior Department action is sustained, the compensation which must be paid to the syndicate for the easement will in large part be determined by the validity of the purported rezoning in question here. The syndicate members have requested an injunction re-

straining the Interior Department from condemning the easement. As of this writing this issue is unresolved.

REASONS FOR GRANTING THE WRIT

I. The Purported Rezoning of the Merrywood Tract Impairs Vital Federal Interests in the Development of the National Capitol Region.

Lying just outside the District of Columbia and within sight of the Capitol building itself, the Merrywood tract is on the threshold of the Nation's Capital. Its proposed development for high-rise apartment buildings will affect many different Federal interests.

A. The Federal Interest in Compatible Land Development of the National Capital Region.

The Federal Government has repeatedly shown its concern that the land use development in and around the District of Columbia should be such that befits the capital city of the Nation. In particular, Congress has stressed the importance of preservation of the Potomac Gorge in its natural state.

In 1924 Congress created the National Capital Park Commission with one of its purposes being "to preserve forest and natural scenry in and around Washington." (Act of June 6, 1924, 43 Stat. 463). In 1926, the powers granted under the 1924 act were transferred to the National Capital Park and Planning Commission. The statutory purpose of this Commission was broadened

to preserve forest and natural scenery in and around Washington and to provide for the comprehensive, systematic and continuous development of park, parkway and playground systems of the National Capital *and its environs.*

Act of April 30, 1926, Sec. 1 (a), 44 Stat. 374. (Italics added.)

In 1930, the Congress expressed the particular Federal concern for the preservation of the Palisades area when in providing for a "comprehensive park, parkway, and playground system of the National Capital" it included as one of its purposes "the protection and preservation of the natural scenery of the Gorge and the Great Falls of the Potomac." Act of May 29, 1930, 46 Stat. 482.

While this act gave authority to acquire park land to plan park systems, the power to exercise the full scope of land use planning for the National Capital Area did not exist until 1952, when Congress established the National Capital Planning Commission as the central planning agency for the District of Columbia and for land owned by the United States within the "environs" of the Nation's Capital. (Montgomery and Prince Georges County in Maryland and the area in Virginia bounded by the outer boundaries of Arlington, Fairfax, Loudoun and Prince William Counties.) This act also established the National Capital Regional Planning Council, composed of the representatives of planning commissions from the jurisdictions within the environs, the chairman of the National Planning Commission and the Engineer Commissioner of the District of Columbia. This Council was authorized to prepare a regional plan "to serve as a general framework or guide of development within which each part of the region may be more precisely planned by the appropriate planning agency or agencies." National Capital Planning Act of 1952, Sec. 3

(d), 66 Stat. 781. The act gave no power by which the Council could force its decision upon the localities concerned.

In 1961, the National Capital Planning Commission and the National Capital Regional Council in discharge of the responsibility given them by the 1952 Act, adopted "A Plan for the Year 2000" as the "basic development scheme" for the National Capital Region. This plan called for "corridors of development" fanning out like spokes from the District of Columbia with open space between these spokes. This plan stated (at p. 56):

> One of the Region's most urgent needs is the prompt preservation of large amounts of open space which will otherwise be rapidly covered by new development. These open spaces will serve several important purposes. Most important, wedges of open space between the proposed corridors will foster their development by directing into them the growth that would otherwise spread across the entire countryside. *Open spaces along the Potomac* will prevent pollution and siltation.
>
> The location of these open wedges of space will be determined in part by the location of the corridors of development. Conversely, the presence of areas especially suitable for preservation in open use will in many instances indicate the directions in which corridors should not be planned. Every effort should be made, for example, to preserve the best of existing natural, scenic and agricultural resources—the Piedmont Dairy Land in Loudoun and Montgomery Counties, the Tobacco Area in Prince Georges County, *the shores of the Potomac and Patuxent Rivers*, and the extensive forest areas in Prince William County. (Italics added.)

On April 10, 1963, prior to the hearing on the Merrywood rezoning before the Fairfax Board of County Supervisors, the Chairman of the National Capital Planning Com-

mission wrote to the Chairman of the Fairfax Board (who was the representative from Fairfax on the Regional Council), calling attention to the Year 2000 Plan and stating:

> Acquisition of land for the George Washington Memorial Parkway on the Maryland shore . . . has now been completed but much of the beautiful scenic bluffs on the Virginia side between Chain Bridge and Great Falls remain in private ownership. Also the first section of the Parkway on the Maryland side will soon be completed and the skyline of the Virginia Palisades will be exposed and, for many miles, will constitute an essential visual part of the parkway.
>
> The Commission is most concerned that the skyline and palisades be retained as nearly as possible in their natural state. Low density residential development is compatible with this objective. *Tall buildings are not.* (Italics added.)

This plea went unheeded by the Fairfax Board.

The commitment of the Federal Government to the Year 2000 Plan was underlined on November 27, 1962, when the President adopted it for the executive branch as "the basic development scheme" of the National Capital Region. President Kennedy directed that each department and agency coordinate its activities with this plan, stating:

> The success of the corridor cities concept depends on the reservation of substantial areas of open countryside from urban development. It shall be the policy of the executive branch to seek to preserve for the benefit of the National Capital Region strategic open spaces, including existing park, woodland, and scenic resources. *The Washington Post*, November 28, 1962, p. A7.

Thus the development plans of the National Capital Planning Commission, the National Capital Regional Coun-

cil, the executive branch of the Federal Government, not to speak of those of Arlington, Prince Georges and Montgomery Counties; called for the preservation of the scenic vistas of the Potomac and are in direct opposition to the proposed apartment development at Merrywood. However, since none of these governmental entities can restrain the irresponsible zoning action of the Fairfax County Board of Supervisors, these plans for the Potomac Gorge are being defeated.

B. *The Federal Interest in Protection of the National Parks.*

When in 1930, Congress expressed its concern for the "protection and preservation of the natural scenery of the Gorge and the Great Falls of the Potomac," it appropriated funds for the completion of the George Washington Memorial Parkway to run on both sides of the river from downstream at Mt. Vernon and Fort Washington to a point above Great Falls. Under the authority of this act the National Park Service acquired land running generally on or near the bank on both sides of the river from below the Key Bridge on the Virginia side to Great Falls. At Merrywood the Parkway loops inland, includes the Civil War site of Fort Marcy and returns to the river as shown in Appendix B. On the Maryland side at Merrywood this act gave authority for the purchase of land for the Parkway and the historic Chesapeake and Ohio Canal. (46 Stat. 482.) Additional funds for the purchase of the canal were made available under the Recovery Act of June 16, 1933, 48 Stat. 195, as amended. This canal property which is closely associated with George Washington is administered by the National Park Service. On November 18, 1961, President Eisenhower under authority from Congress

to declare by public proclamation historic landmarks,

> historic and prehistoric structures, and other objects of historic or scientific interest. . . . [34 Stat. 225 (1906).]

proclaimed that this canal and the land appurtenant to it would henceforth be a National Monument. 26 F. R. 639. The Park Service administers this scenic area for public recreational and natural science use, where wildlife will find a refuge and residents of the metropolitan area and from all over the Nation and the world can view a portion of the Capital area virtually as it was in the time of George Washington.

Thus the Merrywood tract is immediately across the Potomac from the Maryland side of the George Washington Memorial Parkway and the Chesapeake and Ohio Canal Park and is situated between the river and the Virginia portion of the George Washington Memorial Parkway (see Appendix B). The importance to the National Park Service and the National Planning Commission in retaining undisturbed the scenic vista of which the Merrywood tract is a part, is demonstrated by the fact that, as a result of the purported rezoning, the Interior Department on November 16, 1963, filed notice of the condemnation of a scenic easement in Merrywood under provisions of the Act of August 25, 1916, 39 Stat. 533, as amended and supplemented by the Act of August 8, 1953, 67 Stat. 495. The Interior Department has deposited the sum of $500,000 as the estimated fair value of the easement.

As this petition is being written, the validity of this condemnation is being contested in the Federal District Court for the Eastern District of Virginia. The syndicate which has exercised its option and taken title to Merrywood, has requested an injunction prohibiting retention by the Interior Department of the easement. Even if the authority of the Interior Department to condemn such an easement in Merrywood is upheld in this separate pro-

ceeding, the Federal interest affecting the purported rezoning of Merrywood which is at issue here remains undisturbed, inasmuch as the value of the easement condemned, in large measure, depends on the validity of the rezoning for high-rise apartment use. The easement would be of relatively minor impact on the property in its present single family residential use.

C. *Other Federal Interests in the Proposed Merrywood Development.*

In addition to the Federal interest outlined above, the United States has additional property and other interests in the Merrywood area. As the Appendix B demonstrates, the United States is the largest single landowner in the neighborhood. Of the total land within a quarter-mile of Merrywood, at least 50 per cent is Federal property.

1. The Central Intelligence Agency Headquarters at Langley, one and one-half miles from Merrywood, constitutes another Federal interest in opposition to the proposed Merrywood development. Since 1956, CIA officials have stated as a firm agency policy that no change in the character of the surrounding area by construction for apartment houses or otherwise is deemed necessary to serve the Agency or its employees.

2. The utilities necessary to develop Merrywood for apartments would require Federal participation. In order to obtain sewer service, it will be necessary to run a line across the George Washington Memorial Parkway on the Virginia side. By letter of February 15, 1963, addressed to the Fairfax County Executive, the Secretary of the Interior has stated that it is in his opinion not in the public interest for him to grant the required permit for sewer passage. The Fairfax County Board of Supervisors contends that by

contract of September 9, 1958, between the County and the National Capital Planning Commission such permission must be granted. At the time of drafting this petition, the County has not taken any steps leading toward the litigation of its contention. However, if the purported zoning is valid, some resolution of this question must be made before Merrywood can be developed. Moreover, the water supply which will serve the proposed apartments at Merrywood is that obtained from the Dalecarlia Reservoir in the District of Columbia by contract between the Secretary of the Army and the City of Falls Church, Virginia. The water supply line passes over the Little Falls Dam, approximately one-half mile from Merrywood, a dam maintained by the U. S. Corps of Engineers.

3. The United States, through the Corps of Engineers, also regulates navigation in the Potomac River which constitutes one boundary of the Merrywood property. *Corps of Engineers Manual*, 1165-2-302 (1958). Any structure under, on or over the surface of the river must be cleared in advance with the District Engineer's office.

4. Merrywood is situated within the take-off pattern of the Washington National Airport. Before the apartment can be built to the height proposed, there must be compliance with Federal Aviation Agency Regulations, Part 77, concerning height limitation.

There is no question but that the United States has an unusual stake in the Merrywood case. Probably at no other time have the constitutional legal questions inherent in rezoning attempts been presented in such a decidedly Federal framework.

II. Where the Exercise of the Police Power By a Local Government Is Contrary to the General Public Interest, That Exercise Must Be Restrained as Unreasonable.

In the landmark case of *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) upholding the basic constitutionality of a reasonably designed zoning plan, this Court had to deal with the contention that it was unreasonable for Euclid, a small village in the suburbs of Cleveland, Ohio, to attempt to divert the natural expansion of Cleveland industry from the path it would naturally take within Euclid, with consequent loss in value of that land within the village from which industrial use was prohibited. Mr. Justice Sutherland, speaking for the Court, answered this contention by noting that Euclid was a separate political unit with power and authority to govern itself within the law of its creation and the State and Federal Constitutions. He found that if the police power permitted the village to prohibit industry from residential areas then it was difficult to find a sufficient reason to deny that power when the effect was to divert industrial growth from the harmful path it would otherwise follow. Justice Sutherland, however, added the following caveat:

> It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way. 272 U. S. at 390.

Petitioners submit that the Merrywood situation is a case that fits within Justice Sutherland's caveat. Even assuming that the rezoning action of Fairfax County when tested only by considerations within its own boundaries would be reasonable exercise of the police power, the general public welfare (here represented by the strong inter-

ests of Arlington County, Montgomery County, the District of Columbia and the Federal Government in preserving the scenic and historic vista of the Potomac Gorge) renders the rezoning an unreasonable use of that power. The unreasonability of this zoning action is even more clear when its discriminatory aspects with respect to property similarly situated in Fairfax County are considered. These discriminatory or "spot zoning" aspects are discussed in a subsequent section of this petition.

The location of Merrywood on an interstate boundary and within yards of the Arlington County and District of Columbia boundaries gives this rezoning case a decided regional nature. The standards of reasonableness or the public welfare cannot be limited to political boundaries. The New Jersey Supreme Court recognized this fact in a rezoning case involving land at a point where four boroughs came together. The court refused to find that the municipal responsibility of the Borough of Dumont ended at its boundary line and stated: "Knickerbocker Road and Massachusetts Avenue are not Chinese Walls separating Dumont from the adjoining boroughs." *Borough of Cresskill* v. *Borough of Dumont*, 15 N.J. 238, 104 A.2d 441, 445 (1954).

The Fairfax Board of County Supervisors was informed of the views of the National Capital Planning Commission and the National Capital Regional Planning Council. The letter from the Commission Chairman was read aloud at the rezoning hearing. A representative of the Arlington County Board of Supervisors appeared to convey that Board's opposition to the rezoning and its apprehensions as to the impact the rezoning would have on Arlington's ability to maintain the single-family nature of its portion of the "island."

The Fairfax Board ignored the entreaties of the National

Capital Planning Commission. The Circuit Court refused to receive testimony at the trial regarding the position of the National Capital Planning Commission and the National Regional Planning Council on the Merrywood rezoning, despite counsel's argument that such testimony was relevant to the asserted arbitrariness of the Board's action. (Tr., II: 286-88.)

The Board made no finding with respect to how the public health, safety, morals and general welfare of the County would be enhanced by rezoning Merrywood. Apartments were not needed in the County. The proposed tax benefit from the apartments is insufficient to constitute a substantial contribution to the general welfare since every such lawful enterprise so contributes. See *Polk* v. *Axton*, 306 Ky. 498, 500, 208 S.W.2d 497 (1948). Moreover apartments would so contribute equally elsewhere in the County.

The Board's action ignored the substantial Federal interests that were detrimentally affected by the rezoning; the Board ignored the regional plans of the National Capital Planning Commission and the National Capital Regional Council; it ignored the Arlington County Master plan and zoning ordinance, the District of Columbia zoning ordinance and the Montgomery County zoning ordinance. The Circuit Court refused to receive testimony on the position of the Federal regional planning agencies charged by Congress with responsibility for devising a regional plan; it upheld the action of the Board. The Virginia Supreme Court upheld the Circuit Court and the Board, refusing even to hear the case on its merits. Petitioners submit that the Board and the Virginia Courts have refused to recognize that the general welfare knows no state and county limitations. In view of the vital Federal and regional interests in land development concerned in this case, it is *this* court's responsibility to correct those errors.

III. *Lower Court Decisions Reveal a Need for Guidance Regarding the Constitutional Standards Applicable to Rezoning Cases.*

A. *In the Absence of Guidance from this Court Since 1928, the Constitutional Tests Used by Lower Courts in Rezoning Cases Have Been Unevenly Applied.*

In *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926), this Court upheld the fundamental constitutionality of a reasonably drafted zoning ordinance. With that decision this Court set down a standard of "reasonableness" or more specifically, whether the zoning ordinance or provisions thereof "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety and morals or general welfare." 272 U.S. 365, 395. In addition, that decision contained the warning that the determination of reasonability with respect to any particular application of such zoning ordinance must depend upon the circumstances and the locality concerned in each case.

In accordance with that warning, this Court in 1928 reversed the decision of the Supreme Judicial Court of Massachusetts and held that the zoning classification restricting the plaintiff's land to residential use deprived him of his property without due process of law under the Fourteenth Amendment of the Constitution. *Nectow* v. *Cambridge*, 277 U.S. 183 (1928).

Since 1928 this Court has not passed constitutional judgment in a zoning case. See JOHNSON, *Constitutional Law and Community Planning*, 20 Law and Contemp. Prob. 199, 205 (1955). The attitude of at least one state court toward zoning ordinances has resulted in comment that the the legal status of zoning was uncertain. BABCOCK, *The*

Illinois Supreme Court and Zoning: A Study in Uncertainty, 15 U. of Chi. L. Rev. 87 (1947).

Moreover, neither the *Euclid* nor the *Nectow* case involved a change in an existing zoning classification. This Court has not specified the test for such rezoning cases However, a sizeable number of state court decisions have set forth varying tests based upon the *Euclid* and *Nectow* cases as to what standards must be met in a rezoning and particularly a "spot zoning" case such as the one at bar.

This term "spot zoning" has been given different applications, sometimes being used in the descriptive sense meaning a carving out of one or more properties located in a given use district and reclassifying them in a different use district. E.g., *Chayt* v. *Maryland Jockey Club*, 179 Md. 390, 18 A.2d 856, 858, (1941). This term has also been used in a legal sense to mean an unreasonable classification of a piece of land in a use different from that of surrounding areas. It is in this legal sense, meaning an invalid classification, that the term will be used herein. See Annot., 51 A.L.R.2d 263, 266 (1957).

Admittedly, the zoning amendment changing the classification of a particular parcel of land must meet at least the same constitutional standards of reasonableness or conformity with the public welfare as the original zoning enactment. Otherwise, a constitutionally designed zoning ordinance could be legally converted to one unconstitutional by the simple process of amendment. It is the Petitioners' position herein, however, that the touchstones of reasonableness or conformity with the public welfare need further clarification when applied to a rezoning case, particularly in the light of the improvements in the art of urban planning since 1928. These tests of reasonableness and conformity with the public welfare will mean nothing if

the test is applied only to the parcel rezoned and not to other landowners similarly situated. Similarly, the test of conformity to the public welfare if of little protection against discrimination if the test is met simply by noting that the rezoned parcel will be of benefit to the community without distinguishing between the benefit to be accrued from the particular parcel rezoned as opposed to other similar parcels.

The tests of validity that have been generally used in spot zoning cases have sometimes been separately stated or applied in combination. These tests are (1) whether or not the amendatory ordinance is in accordance with a comprehensive plan, or (2) whether or not it is reasonably designed to support the health, safety, morals and general welfare. For collected case see Annot., 51 A.L.R.2d 263, 274 (1957). Ambiguity often arises with the test of conformity with the comprehensive plan since many state zoning enabling statutes specify that zoning ordinances must be "in accordance with a comprehensive plan." E.g., Va. Code §§ 15-821, 15-858 (Michie, 1950). The Standard State Enabling Act contains such a provision. U. S. Department of Commerce, Advisory Commission on Zoning, *A Standard State Zoning Enabling Act*, (Washington: 1922, Rev. Eds., Government Printing Office, 1924, 1926). It has been noted, however, that the statutory requirement of being in accordance with a comprehensive plan has in spot zoning cases generally been treated as simply a reminder of the constitutional requirement. HAAR, *In Accordance With a Comprehensive Plan*, 68 Harv. L. Rev. 1154, 1170 (1955).

While a number of Courts have specifically required an approach to rezoning amendments which avoids discriminatory treatment of one parcel or parcels of land, eg., *Keller* v. *City of Council Bluffs*, 66 N.W.2d. 113, 51 A.L.R.2d

251 (Iowa, 1954). Other Courts merely require the broad test of reasonableness: e.g., *Ex parte Quong Wo*, 161 Cal. 220, 118 P. 714 (1911)—or find conformity with a comprehensive plan in policy statements of the local rezoning body; e.g., *Rodgers* v. *Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731 (1951).

In the *Keller* case, the Court stated:

> The better rule, we think, is that there must be substantial and reasonable grounds or basis for the discrimination when one lot or tract is singled out in amendatory ordinance removing therefrom restrictions imposed upon the remaining portion of the same zoning district. . . . When the tract is shown to be clearly different in character or use from those around it, discrimination may be legally justified. 66 N.W.2d at 120.

In the *Rodgers* case, however, the Court upheld the rezoning (after a vigorous dissent from two judges) stating that the village Board of Trustees was entitled to make such findings as the existence of real need for additional housing and that the creation of the new residential zone would prevent young families from moving elsewhere. No showing was required that other property would not meet these needs.

Another instance showing the need for constitutional guidance in spot zoning standards is found in *Vulcan Materials Co.* v. *Griffith*, 215 Ga. 811, 114 S.E.2d 29 (1960). There the Court interpreted an amendment to the state constitution and the zoning enabling statutes as authorizing the local zoning body to create a zoning district of any size or shape without any judicial review being permitted. The Court stated that:

> . . . the County Commissioners have complete freedom to create any number of zones and districts and of such

size and scope as they may arbitrarily choose. . . . Indeed both the constitution and the statutes authorize what this Court has called spot zoning. 114 S.E.2d 32, 33.

The opinion fails to mention any Federal constitutional standards or imply that such standards might limit spot zoning action regardless of the broad delegation of authority in the state constitution.

Virginia Courts have not passed on the spot zoning situation. The Virginia General Assembly in Sections 15-844 and 15-855 of the Code (the two sets of enabling acts applying to counties) delegated the power to divide the county territory into districts and to regulate activities within the districts. In Sections 15-845, 15-857 and 15-858 the legislature required that regulations within districts must be uniform and made in accordance with a comprehensive plan. The reasonableness of the restrictions imposed by the governing body to the exercise of the zoning power is subject to judicial review. See *Fairfax County* v. *Parker*, 186 Va. 675, 680, 44 S.E.2d 9, 11 (1947); *City of Richmond* v. *Southern Railway*, 203 Va. 220, 123 S.E.2d 641 (1962). The classifications imposed must have some rational basis and must apply alike to all persons and things falling within a designated class. *Andrews* v. *Board of Supervisors of Loudoun County*, 200 Va. 637, 107 S.E.2d 445 (1959).

If the constitutional standard for Virginia or any other state in the spot zoning situation is to be only the non-specific one of reasonability or whether the rezoning body was arbitrary and capricious in its action, the door is left open for indescriminate rezoning with consequent threat of heterogenous land use and favoritism by members of local

boards. It would be only the relatively rare case such as the one at bar where the local board did not manufacture after the fact some reason which would support the rezoning of the "spot." It would be possible in almost every case to retain a planning expert who could testify that the use to which the "spot" was rezoned was a "reasonable" one for that parcel.

While the broad standards of reasonableness or conformity with the health, safety, morals and general welfare were perhaps the only standards which could have been advanced in 1928, urban or regional planning has advanced to the stage where there are well accepted tools and methods for correlating zoning with planning and for making factual comparisons in spot zoning cases. See International City Managers Association, *Local Planning Administration*, 306-11, 320 (3d ed., 1959).

Land use information, population, housing and traffic data are well known to the urban planner or zoning commissioner of the 1960's. The planning staff of Fairfax County had, prior to the Merrywood application, produced a general study of the county which made reasoned choices of areas for high-rise apartments. There was no lack of means to introduce high-rise apartments to the county on a rational basis. The Board simply chose instead to follow a policy of what has amounted to favoritism toward a few, coupled apparently with more than a taint of self-service.

Guidance from this court in the spot zoning situation is necessary to add specificity to the basic constitutional test of reasonableness. While any coordinated relationship between planning and zoning must be founded upon legislative action—such as the requirement of a community

master plan before land control powers are delegated or existing controls changed—the specification by this court of the requirement that rezoning be supported by findings of fact and comparative analysis between similar parcels on a community-wide basis would do much toward guarding the landowner from arbitrary action by local officials.

B. *The Merrywood Case Presents a Clear Example of Invalid Spot Zoning.*

The purported rezoning of the Merrywood tract for high-rise apartments in the middle of a community of single-family residential estates has clearly injured Petitioners. Mr. Bross testified that the proposed apartments would decrease the value of his property, would detract from his privacy, would cause traffic congestion and would severely change the character of the neighborhood. (Tr., II, 17-20.) Other petitioners testified similarly. There is no question but that the injection of 1030 families into a neighborhood which now contains 40 would have a serious impact. As this Court said in the *Euclid* case:

> With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business. . . .
> 272 U.S. 365, 394 (1926).

Moreover, it is also clear that Respondents have been granted an extremely valuable benefit which has been denied to Petitioners. The rezoning alone raised the value of the Merrywood tract from the purchase price of about $650,000 to about $2,000,000. To the extent that the zoning ordinance, although reasonable on its face, was not reasonably applied, in that no reasonable distinction was or could be made between Petitioners' property and Merrywood, then Petitioners have been the victims of a discriminatory application of that ordinance and have been denied equal protection of the laws in violation of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886).

It is also clear that Merrywood constitutes a "spot" with respect to surrounding zoning classifications and land use. At the time of the rezoning there were no apartments of any kind permitted in the entire Dranesville Magisterial District. Only one other site in the county had been zoned for high-rise apartments and it was located more than five miles away at Seven Corners in a different magisterial district and in an entirely separate community. The land immediately across the Arlington County line and across the Potomac River was either in park use or zoned for single family residences. The nearest commercial uses were outside the "island," two gas stations on the highway to McLean, or more than two and one-half miles away in the District of Columbia or Arlington.

Courts have generally looked askance at a zoning amendment singling out a new zoning district of a less restrictive nature in the middle of a highly restricted area. In *Mathis* v. *Hannan*, 306 S.W.2d 278 (Ky., 1957) the zoning authority rezoned 13 acres from residential to business for a shopping center. Upon appeal the Supreme Court voided the rezoning quoting with approval from its decision in

Parker v. *Rash*, 314 Ky. 609, 236 S.W.2d 687, 689 (1951) and from 149 A.L.R. 292 (1944):

> So generally speaking, it has been held that when ordinance establishes a small area within the limits of a zone in which are permitted uses different from or inconsistent with those permitted within the larger, such "spot zoning" is invalid where the ordinance does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare. 306 S.W.2d 278, 281.

The Kentucky Court in *Mathis* also rejected the contention that the concept of spot zoning applies only to small lots, saying:

> We believe that each case must be decided in accordance with its own circumstances. We cannot arbitrarily say that a 50 ft. lot is small and that a 13 or 14-acre tract is not small. Each must be related to its own surroundings. The fact that this tract is owned singly does not change its character. 306 S.W.2d 278, 280.

In the case of *Miller* v. *Town Planning Commission*, 142 Conn. 265, 113 A.2d 504, 508 (1955), the defendant owned a parcel of land zoned partly commercial and partly residential. He was granted commercial zoning. Property owners nearby sued to invalidate the amendment. Upon appeal the Supreme Court held that the change did not conform to a comprehensive plan and fostered the interest of the owner of the property, but discriminated against other property owners simularly situated. The court said: "The change has all of the vices of 'spot zoning' in that it singles out a small area for special treatment in a manner which does not further the comprehensive plan."

There has been no change in circumstances since 1959 when Merrywood was last zoned for single-family

residential use that would justify rezoning for high-rise apartments. The location of the Central Intelligence Agency outside the "island" could not be considered such a justification because CIA officials since 1956 have stated it to be a firm agency policy that no change in the character of the surrounding area by construction of apartment houses or otherwise is deemed necessary to serve the Agency or its employees. Fairfax was officially informed of this Agency policy from the outset and evidence to that effect was included in the record. Respondents introduced nothing to rebut this evidence, nor could they. Nor can the increase in population of the Metropolitan area or Fairfax County be cited as a change in circumstances justifying the rezoning of Merrywood; on such reasoning any parcel in the county could be rezoned at will.

In *American Oil Company* v. *Miller*, 102 A.2d 727 (Md., 1954), the county commissioners rezoned a parcel from agricultural to commercial in order to permit a filling station to be located on a highway intersection. In a suit brought by neighboring property owners, the Supreme Court said that although there was a presumption in favor of the legality of the rezoning, the original zoning was also presumed to be well planned and designed to be permanent. The court held that in order for the zoning to be valid it must appear that either there was a mistake in the original zoning, or that the character of the neighborhood had changed to such an extent to justify an amendatory action.

Merrywood was not rezoned by the Board of Supervisors on the basis of any comprehensive or general plan or study of the county, the magisterial district or the neighborhood. The rezoning was accomplished on the basis alone of the petition of the contract owners of the land. The high-rise apartment classification was originally adopted without reference to any land whatsoever. The land which had been recommended for such use by the planning staff of the county was rejected by the Board of Super-

visors. The Board thereby rejected any comprehensive, general, or overall approach and instead proclaimed that it would rezone for high-rise apartments on an individual "first-come, first-served" basis.

The Court's attention is called to the decision of the Supreme Court of Oregon, *Page* v. *City of Portland*, 178 Ore. 632, 165 P.2d 280 (1946), where in striking down a rezoning, the court said: "Amendments to zoning ordinances should be made with caution and only when changing conditions clearly require an amendment. Otherwise, the very purpose of zoning will be destroyed." 165 P.2d 283.

Similarly, see *Leahy* v. *Inspector of Buildings*, 308 Mass. 128, 31 N.E.2d 436 (1941).

No distinction was made by the Fairfax board or at the trial between Merrywood and other similar property in other parts of the county or in the "island" and particularly no distinction was made with respect to the property of Petitioners. Uncontroverted evidence showed that the topography and other parts of the "island," including the property of Petitioners is similar to that of Merrywood. Nor can the 46-acre size of Merrywood be advanced as a meaningful distinction. In the approximately 300 acre area of the "island" there is ample space for similar apartment developments. Indeed three Petitioners themselves own a contiguous tract on both sides of Chain Bridge Road and bordering on Merrywood which consists of more than 22 acres.

In fact, Respondents' own planning expert submitted a report which recommended that the whole "island" should be zoned for multiple-family use. The member of the Planning Staff which rendered its three-to-one split recommendation to the board that the application be approved admit-

ted that the staff examination had not been of such depth that he could say even as to existing ownership parcels that there was no other land in the "island" equally suitable for apartments.

The Planning Commission in recommending to the board that the application be denied stated that it did not meet the criteria set forth by the board for apartment rezoning. Specifically the commission reported, "There are many areas in highly suitable locations in the county planned for apartment development which would be compatable with that existing and which would not destroy the character of development established in such areas." Thus, there was no need to single out Merrywood for apartment use. No reasoned comparison was made with other sections of the county or indeed with other parts of the "island" to show a reasonable jusification for the spot zoning of Merrywood.

The foregoing discussion demonstrates that the action of the Board of County Supervisors in rezoning Merrywood for high-rise apartment houses was unreasonable in many respects. A rezoning action which lacks reasonable basis is unconstitutional and void under Section 1 of the Fourteenth Amendment of the Constitution of the United States as to property owners, such as Petitioners, affected thereby, since it deprives them of property rights without due process of law and or denies them the equal protection of the laws.

In *Wilcox* v. *City of Pittsburgh*, 121 F.2d 835 (3d Cir., 1941), the city amended the basic zoning ordinance to rezone one block previously zoned for single dwellings to permit construction of a large apartment house. The rezoning was effected at the request of the owner of six acres in the block rezoned which was in "a distinctively high-

class private residential locality." Plaintiffs, who were nearby property owners, sued to enjoin an enforcement of the amendatory ordinance and appealed from the dismissal of their complaint. The Court of Appeals, Third Circuit, reversed the trial court and remanded, finding that the amended complaint stated a cause of action for injunctive relief based upon an alleged deprivation of property without due process of law. The court said *inter alia* (p. 837):

> The Appellants' complaint contained three significant assertions. . . . The amended ordinance selects one block out of a larger area; the amendment to the ordinance had an instigator; and finally there has been no change in conditions. It may be that the first two factors are not sufficient. . . . The courts, however, have not been unworldly enough to ignore the effect of an anxious client and persistent counsel on the minds of councilmen. If we add to these two considerations the allegation that there has been no change in neighborhood character, the validity of the complaint becomes too plain for argument. As conditions of the basis and justification for zoning, clearly a change in the former is essential to a change in the latter.

In the light of the admitted similarity between and among all properties within the "island," the case of *Weaver v. Ham*, 232 S.W.2d 704 (Tex., 1950) is significant. There the Texas Supreme Court held and agreed with the trial court that the rezoning created a small and unwarranted apartment zone in the center of the Zone A residential district, which was not justified by any change of condition; that the rezoning was therefore unreasonable and discriminatory and did not promote the health and welfare of the community; and that the amendatory ordinance was unconstitutional and void.

The rezoning actions in the *Ham* decision, *supra*, and in the Merrywood case are alike in being unreasonable and

discriminatory, hence unconstitutional and void—because both actions violate the guiding principal that "zoning is regulation by districts and not by individual pieces of property." *Sinclair Refining Company* v. *City of Chicago*, 178 F.2d 214, 217 (7th Cir., 1949).

C. *The Fairfax Board's Rezoning Procedures in the Merrywood Case Did Not Meet Constitutional Standards of a Fair Hearing.*

The Fairfax Board's hearing of the Merrywood rezoning application points up the fact that this court has not laid down constitutional guidelines in such cases which are sufficient to protect interested parties. The treatment by state courts of rezoning as purely a legislative matter has deprived interested land owners of their rights to obtain a fair hearing and indeed to obtain effective judicial review of that hearing.

Articles 2 and 3 of Chapter 24, Title 15 of the Code of Virginia, provide that a Board of County Supervisors cannot act until it has first referred the proposed zoning ordinance or amendment to the Planning Commission for its recommendation and has held a public hearing. Further, the Constitution of the United States requires that property rights may not be impaired without due process of law; due process of law requires at a minimum a full and fair hearing.

Petitioners do not here contest the adequacy of the notice given with respect to the hearing of this case or the adequacy of their opportunity to present their views in opposition to the rezoning. The question to be decided is whether the requirement of a hearing which due process demands is satisfied by mere formality, or whether the board is bound to base its judgment upon the facts of

record at the hearing and the recommendation of the Planning Commission.

The record herein discloses that *ex parte* representations were made to members of the board by the Sheriff of Fairfax County, who was a party in interest, that Supervisor Leigh, the member of the board who made the motion to rezone, had prejudged the case and attempted to work out a vote swap, that Leigh had an application for a loan pending at a bank where two participants in the Merrywood syndicate were board members. The record shows that none of these facts were mentioned at the hearing and were disclosed after the decision.[1]

Petitioners contend that a public hearing is more than a formality, that although a board of county supervisors may be acting in a legislative capacity when it zones or rezones, the public hearing which the legislature has required partakes of a judicial determination. In particular, when the board acts upon the application of individual landowners, nearby property holders should have some protection against arbitrary or dishonest action affecting their property rights. Such a hearing must be more than the appointed time at which the board announces a decision already made; the public hearing is the essence of the decisional process. A long line of cases has spelled out what is meant by a requirement of a public hearing.

In *Morgan v. United States*, 298 U.S. 468, 480 (1936) this Court considered the requirement in a Federal statute of a "full hearing" in a proceeding looking to legislative

[1] Much of these facts are taken from Exhibit 42 and the testimony of Supervisor Wilkins. Respondents have mistakenly argued that Exhibit 42 was not received into evidence. Reference to the Record at page 36 will show that Exhibit 42 was by stipulation introduced into evidence, "subject to objections of materiality and relevance." No such objections to this exhibit were made.

action in the fixing of rates of marketing agencies. This Court said:

> There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances which ought to be considered must not be excluded. *Facts and circumstances must not be considered which should not legally influence the conclusion.* Findings based on the evidence must embrace the basic facts which are needed to sustain the order. . . . The hearing is designed to afford the safeguard that one who decides shall be bound in good conscience to consider the evidence, to be *guided by that alone*, and to reach his conclusions uninfluenced by extraneous considerations. (Italics added.)

See also, *Southern R. R.* v. *Virginia*, 290 U. S. 190 (1933) and *Ohio Bell Telephone Co.* v. *P. U. C.*, 301 U.S. 292, 304 (1937) where this Court noted the importance "when power has been bestowed so freely, that the inexorable safeguard . . . a fair and open hearing be maintained in its integrity."

In *Inland Steel Company* v. *N.L.R.B.*, 109 F.2d 9, 20 (7th Cir., 1940) the court stated that a hearing required by statute "must mean a trial by tribunal free from bias and prejudice and imbued with the desire to accord to the parties equal consideration." And in *Norris & Hirshburg* v. *S.E.C.*, 163 F.2d 689, 693 (D. C. Cir., 1947) the court stated ". . . it is of first importance for the court to know whether, in reaching its decision the commission considered as evidence all the matter which was introduced as such, and *nothing more*. That was its duty. If the duty was not performed, the order was void *ab initio*." See also, *Powhatan Mining Company* v. *Ickes*, 118 Fed.2d 105 (6th Cir., 1941).

Thus, the Federal Courts have ruled that administrative agencies such as the Securities Exchange Commission,

National Labor Relations Board and Interstate Commerce Commission, as well as the Secretaries of Agriculture and Interior and other similar agencies must conduct fair, impartial, unbiased hearings, must disclose all evidence relied upon and must base their decisions upon evidence of record. Reliance on undisclosed facts or upon arguments outside the record, prejudgment of a case prior to hearings or prejudicial conduct at the hearing results in an order which is void *ab initio*. This principal that administrative determinations affecting property rights must be predicated upon a full and fair public hearing is equally applicable to state and local agencies as it is to Federal administrative agencies. For example, see *American Eagle Fire Insurance Company* v. *Jordan*, 67 Fed. Supp., 76, 80-82 (D.D.C., 1946). See also, *McGrew* v. *Industrial Commission*, 96 Utah 203, 85 P. 608, 618 (1938); *Merritt* v. *Swope*, 267 App. Div. 519, 46 N.Y. Supp. 2d 944, 948 (1944); *Pennsylvania Railway Company* v. *New Jersey State Aviation Commission*, 65 A.2d 61, 64 (N. J., 1949); In re *Plainfield-Union Water Company*, 94 A.2d 673, 677 (N.J., 1953).

The only determination in Virginia on the subject of what is meant by public hearing in a zoning matter has been in the case of *Blankenship* v. *City of Richmond*, 188 Va. 97, 49 S.E.2d 321 (1948) where the court held that the pecuniary interest of a member on the subject of rezoning did not vitiate the action of a council under a conflicts of interest statute applying only to contracts, and *Ciaffone* v. *Community Shopping Corporation*, 195 Va. 41, 77 S.E.2d 817 (1953) where the court held that the notice requirement under the zoning enabling statute did not require an accurate forecast of the precise action the county board was about to take at a public hearing. Aside from these cases there is no Virginia law on what is required at a public zoning hearing. There are no ground rules as to the swearing of witnesses, cross examination, the burden of proof

upon applicants for a change. Specification of constitutional guidelines is required for the protection of property interests of persons affected by rezoning amendments.

One example of the jeopardy in which property owners are placed is described in *Vulcan Materials Co. v. Griffith*, 215 Ga. 811, 114 S.E.2d 29, 33 (1960) where the court in discussing a zoning hearing found that, "The kind of hearing is not prescribed, and irrespective of what is shown at such hearing the authorities are given absolute power to proceed as they choose in total disregard of what such hearings reveal."

Such a finding with respect to a public hearing, Petitioners submit, is at direct odds with the reasoning and spirit of the line of this Court's decisions discussed above. In moving from administrative hearings to zoning hearings, one does not move from due process to the star chamber. This Court should make that clear.

In this case it is quite clear from Mr. Leigh's banking arrangements with the bank of which some of the syndicate members are directors and from his offer of a vote-swap with Mrs. Wilkins that he had prejudged the outcome of the application. If Mr. Leigh had based his vote on unrevealed factual information obtained outside the hearing regarding some aspect of Respondents' or Petitioners' property, it is quite clear that on the authority of the chain of cases discussed above, the hearing would not have been a fair one. Consequently the hearing cannot be said to have been any more fair if he based his decision upon favors he was to receive or had received from Respondents.

Petitioners submit that because of the *ex parte* communications in the present case which were not disclosed at the hearing and because of the reliance on matters not presented at the hearing, Petitioners have been deprived

of the fair hearing required by the Constitution, that the action of the board was wholly invalid and should be set aside.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

J. SLOAN KUYKENDALL
E. A. PRICHARD
STILSON H. HALL
CLIVE L. DUVAL, II
RICHARD R. G. HOBSON
Counsel for Petitioner

December 9, 1963.

APPENDIX

To Petition for
A Writ of Certiorari

APPENDIX A

Portions of the Record

1. Amended Bill of Complaint Filed September 7, 1962.

VIRGINIA:
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN A. BROSS, et al.,

Complainants,

versus

THE BOARD OF COUNTY SUPERVISORS OF FAIRFAX COUNTY, a body politic, et al.,

Defendants.

IN CHANCERY No. 16912

AMENDED
BILL OF COMPLAINT

Filed September 7, 1962
Thomas P. Chapman, Jr.,
Clerk of the Circuit Court
of Fairfax County, Virginia

TO THE HONORABLE JUDGES OF SAID COURT:

The undersigned respectfully represent unto this Honorable Court as follows:

1. Complainants are residents and domiciliaries of

Dranesville Magisterial District in the County of Fairfax residing in the vicinity of a tract of land standing on the land records in the name of Hugh D. Auchincloss and being particularly described in a deed recorded in Liber O No. 11 at Page 472 of the land records of Fairfax County, Virginia.

2. Prior to April 18, 1962, said tract of land was shown on the official zoning map of Fairfax County, Virginia, Zoned "RE-1," in accordance with the official zoning ordinance of Fairfax County, Chapter 30, Code of the County of Fairfax (Michie, 1961).

3. At a meeting of the Board of County Supervisors held on Wednesday, April 18, 1962, the Board undertook upon the motion of A. Claiborne Leigh to change the zoning of said parcel of ground from RE-1 to RM-2H. The vote upon the motion was 5 votes in favor and 2 votes against.

4. Complainants John A. Bross, Joanne B. Bross, Charlotte H. Myers, Talbot M. Jenkins, Anne C. Jenkins, George Southall and Evelyn H. Southall and Miriam Garner, collectively own more than 20 per cent of the land within 500 feet of the boundary of the said tract of land owned by Hugh D. Auchincloss.

5. Prior to the vote having been taken or the motion having been made to change the zoning of said parcel of ground, complainants and others filed with the Board of County Supervisors written protests against the proposed amendment and change of the zoning map. Photographic copies of said written protests are hereto attached as Exhibit "A" and asked to be read as a part hereof.

6. The action of the Board of County Supervisors in attempting to change the zone of the said Auchincloss parcel was contrary to the recommendation of the Planning

Commission of Fairfax County. It was also contrary to the announced public policy of the County governing apartment zoning in that said parcel did not comply with the criteria for determining which parcels of ground would be considered for the RM-2 Zone. The action of the Board was arbitrary because it discriminated against the owners of other parcels of ground which do comply with the said criteria.

7. The action of the Board of County Supervisors of April 18, 1962 in attempting to change the zone of said parcel from RE-1 to RM-2H was void because A. Claiborne Leigh, who made the motion to re-zone had removed from the District he was elected to represent and because pursuant to Section 15-488 his office had thereby become vacant.

8. The action of the Board of County Supervisors in attempting to change the zoning of said parcel from RE-1 to RM-2H was ineffectual and void because pursuant to Section 15-861, Code of Virginia, Michie 1950, (Chapter 355 of the Acts of Assembly of 1936, as amended) a four-fifths vote of the Board of Supervisors was required. The vote of two members of the Board therefore defeated the proposed change and the zoning of said parcel remains RE-1.

9. The action of the Board of County Supervisors in attempting to change the zoning of said parcel was arbitrary, capricious, unreasonable, illegal and void because the action bore no substantial relation to the public health, safety, morals or welfare of the community or the neighborhood.

10. As a result of the attempted change by the Board of County Supervisors of the Zoning Classification of said property an actual controversy exists.

11. The action of the Board of County Supervisors in attempting to change the zoning of said parcel was not uniform in its application in that it was based solely upon the wishes of the owners of the Auchincloss property rather than upon a comprehensive plan of residential development for the neighborhood, or the county as a whole. The purported action was taken without consideration for the existing use of other property in the area and attempted to permit the owner of the Auchincloss property to use their property for a purpose forbidden complainants and every other property owner in the neighborhood and area, unlawfully discriminated against complainants and deprived them of the equal protection of the laws and of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

12. The action of the Board of County Supervisors in attempting to change the zoning of said parcel was based upon the consideration of improper and extrinsic factors rather than upon the recommendation of the Planning Commission and the evidence presented at the hearing. The requirements of Section 15-860 or 15-847 of the Code of Virginia (whichever is deemed to apply) that changes in the zoning map may be made only after public hearing were not met, and the purported action was illegal and void.

WHEREFORE and pursuant to Section 8-578 of the Code of Virginia your complainants pray that this Honorable Court may enter a declaratory judgment decreeing:

(a) That the proper zoning classification of the property described in paragraph one hereof is "RE-1," that as a result of the written protest of some of your complainants the same may not be changed without a vote of six members of the Board of County Supervisors;

(b) That the Office of A. Claiborne Leigh as a member

of the Board of County Supervisors is vacant as a result of his having removed from the Magisterial District he was elected to represent and that the motion made by him to change the zoning of the property described in paragraph one is therefore a nullity.

(c) That the action of the Board of County Supervisors in attempting to change the zoning of said property is void as bearing no reasonable relation to the health, safety, morals and general welfare of the community and the neighborhood and that the zoning classification of said property therefore remains "RE-1."

(d) That the action of the Board of County Supervisors in attempting to change the zoning of said property is void because the requirement of a public hearing was not met and the action was based upon improper and extrinsic factors.

(e) That the action of the Board of County Supervisors in attempting to change the zoning of said property is void because it discriminated against complainants, deprived them of their property without due process of law and of the equal protection of the laws in violation of the Constitution of the United States.

Respectfully submitted.

John A. Bross, et al.

By (s) E. A. Prichard
Their Counsel

[Firm name and address of counsel omitted.]

2. Second Amended Bill of Complaint.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN A. BROSS, et al.

versus

THE BOARD OF COUNTY SUPERVISORS OF FAIRFAX COUNTY, et als.

IN CHANCERY No. 16912
SECOND AMENDED BILL OF COMPLAINT

Filed September 13, 1962
Thomas P. Chapman, Jr.
Clerk of the Circuit Court
of Fairfax County, Virginia

TO THE HONORABLE JUDGES OF SAID COURT:

The undersigned respectfully represent unto this Honorable Court as follows:

1. Complainants are residents and domiciliaries of Dranesville Magisterial District in the County of Fairfax residing in the vicinity of a tract of land standing on the land records in the name of Hugh D. Auchincloss and being particularly described in a deed recorded in Liber O No. 11 at Page 472 of the land records of Fairfax County, Virginia.

2. Prior to April 18, 1962, said tract of land was shown on the official zoning map of Fairfax County, Virginia, zoned "RE-1," in accordance with the official zoning ordin-

ance of Fairfax County, Chapter 10, Code of the County of Fairfax (Michie 1961).

3. At a meeting of the Board of County Supervisors held on Wednesday, April 18, 1962, the Board undertook upon the motion of A. Claiborne Leigh to change the zoning of said parcel of ground from RE-1 to RM-2H. The vote upon the motion was 5 votes in favor and 2 votes against.

4. Complainants, John A. Bross, Joanne Bross, Charlotte M. Myers, Talbot W. Jenkins, Anne C. Jenkins, George Southall and Evelyn H. Southall and Miriam Garner, collectively own more than 20 per cent of the land within 500 feet of the boundary of the said tract of land owned by Hugh D. Auchincloss.

5. Prior to the vote having been taken or the motion having been made to change the zoning of said parcel of ground, complainants and others filed with the Board of County Supervisors written protests against the proposed amendment and change of the zoning map. Photographic copies of said written protests are hereto attached as Exhibit "A" and asked to be read as a part hereof.

6. The action of the Board of Supervisors in attempting to change the zone of the said Auchincloss parcel was contrary to the recommendation of the Planning Commission of Fairfax County. It was also contrary to the announced public policy of the county governing apartment zoning in that said parcel did not comply with the criteria for determining which parcels of ground would be considered for the RM-2H Zone. The action of the Board was arbitrary because it discriminated against the owners of other parcels of ground which do comply with the said criteria.

7. The action of the Board of County Supervisors on

April 18, 1962, in attempting to change the zone of said parcel from RE-1 to RM-2H was void because A. Claiborne Leigh, who made the motion to re-zone, had removed from the Magisterial District he was elected to represent, and pursuant to Section 15-488 his office had thereby become vacant.

8. The action of the Board of County Supervisors in attempting to change the zoning of said parcel from RE-1 to RM-2H was ineffectual and void because pursuant to Sec. 15-861, Code of Virginia, Michie 1950, (Chapter 355 of the Acts of Assembly of 1936, as amended) a four-fifths vote of the Board of Supervisors was required. The vote of two members of the Board therefore defeated the proposed change and the zoning of said parcel remains RE-1.

9. The action of the Board of County Supervisors in attempting to change the zoning of said parcel was arbitrary, capricious, unreasonable, illegal and void because the action bore no substantial relation to the public health, safety, morals or welfare of the community or the neighborhood.

10. As a result of the attempted change by the Board of County Supervisors of the zoning classification of said property an actual controversy exists.

11. The action of the Board of County Supervisors in attempting to change the zoning of said parcel was not uniform in its application in that it was based solely upon the wishes of the owners of the Auchincloss property rather than upon a comprehensive plan of residential development for the neighborhood, or the county as a whole. The purported action was taken without consideration for the existing use of other property in the area and attempted to permit the owner of the Auchincloss property to use their

property for a purpose forbidden complainants and every other property owner in the neighborhood and area, unlawfully discriminated against complainants and deprived them of the equal protection of the laws and of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

12. The action of the Board of County Supervisors in attempting to change the zoning of said parcel was based upon the consideration of improper and extrinsic factors rather than upon the recommendation of the Planning Commission and the evidence presented at the hearing. The requirements of Section 15-860 or 15-847 of the Code of Virginia (whichever is deemed to apply) that changes in the zoning map may be made only after public hearing were not met, and the purported action was illegal and void.

13. The action of the Board of Supervisors of Fairfax County at its meeting on April 18, 1962, in its attempt to amend the zoning ordinance of Fairfax County, by zoning the Merrywood tract of land RM-2H was illegal and void for this, to-wit:

(a) Proper notice of a public hearing was not given as required by law.

(b) the zoning map, a part of the zoning ordinance of Fairfax County, was not amended and changed nor were the boundaries of the zoning district in which the Merrywood property is situate changed as contemplated by law and the zoning ordiance of Fairfax County; nor did the Board of Supervisors, at its April 18, 1962, meeting take action with respect to the zoning map which is a part of the zoning ordinance of Fairfax County.

(c) The Board of Supervisors of Fairfax County, at its April 18, 1962, meeting, passed a motion granting the application of Sheldon Magazine to zone the Merrywood property as RM-2H.

(d) The Merrywood tract of land is situate within an RE-1 district as established by the zoning ordinance of Fairfax County, and the action of the Board of Supervisors at its meeting on April 18, 1962, did not effect a change in the boundaires of said zoning district.

(e) The attempted zoning of the Merrywood tract as RM-2H is not in harmony with a comprehensive plan of land use as required by law.

WHEREFORE and pursuant to Section 8-578 of the Code of Virginia your complainants pray that this Honorable Court may enter a declaratory judgment decreeing:

(a) That the proper zoning classification of the property described in paragraph one hereof is "RE-1," that as a result of the written protest of some of your complainants the same may not be changed without a vote of six members of the Board of County Supervisors.

(b) That the Office of A. Claiborne Leigh as a member of the Board of County Supervisors is vacant as a result of his having removed from the Magisterial District he was elected to represent and that the motion made by him to change the zoning of the property described in paragraph one is therefore a nullity.

(c) That the action of the Board of County Supervisors in attempting to change the zoning of said property is void as bearing no reasonable relation to the health, safety, morals and general welfare of the community and the neighborhood and that the zoning classification of said property threfore remains "RE-1."

(d) That the action of the Board of County Supervisors in attempting to change the zoning of said property is void because the requirement of a public hearing was not met and the action was based upon improper and extrinsic factors.

(e) That the action of the Board of County Supervisors in attempting to change the zoning of said property is void because it discriminated against complainants, deprived them of their property without due process of law and of the equal protection of the laws in violation of the Constitution of the United States.

Respectfully submitted

John A. Bross, et al.
By (s) E. A. Prichard
Their Counsel

[Firm name and address of counsel omitted.]

3. Final Decree Entered October 19, 1962.

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

JOHN A. BROSS, et als.,

Complainants,

versus

THE BOARD OF COUNTY SUPERVISORS OF FAIRFAX COUNTY, et als.,

Defendants.

IN CHANCERY No. 16912

FINAL DECREE

This cause came on to be heard on the 12th day of September, 1962, before the Court sitting without a jury upon the papers formerly read and upon the Decree entered September 7, 1962, granting Complainants leave to amend their complaint, upon the Amended Bill of Complaint filed by the Complainants pursuant to the said leave granted to them, upon the Demurrer to the Amended Bill of Complaint of the Defendant Hugh D. Auchincloss, upon the Motion of the Defendant Hugh D. Auchincloss to exclude evidence as to certain allegations of the Amended Bill of Complaint, upon the Answer of the Defendant Hugh D. Auchincloss to the Amended Bill of Complaint, upon the Demurrer to the Amended Bill of Complaint of the Defendants, the Board of County Supervisors of Fairfax County, Virginia, upon the Motion of the Defendants, the Board of County Supervisors of Fairfax County, Virginia, to exclude evidence as to certain allegations of the Amended Bill of Complaint, upon the Answer of the Defendants,

the Board of County Supervisors of Fairfax County, Virginia, to the Amended Bill of Complaint, upon the written stipulation, together with the exhibits therewith filed in open Court, upon the evidence heard and taken in open Court, and this cause came on further to be heard on the 13th day of September, 1962, upon the Motion of the Complainants to file their second Amended Bill of Complaint, upon the Motion of the Petitioners to file their amended Petition upon the objection of all the Defendants to the said motions to amend, upon the denial of the Court of the said motions to amend, upon the statement of the Complainants and the Petitioners that in view of the Court's ruling they would be forced to take a nonsuit, upon the withdrawal by all Defendants, of their objections to the said motions to amend, upon the second Amended Bill of Complaint and Amended Petition filed in open Court, the Court thereupon directing the Defendants to file their Answers to the second Amended Bill of Complaint and Amended Petition, the Motions of the Defendants to exclude evidence and the Demurrer theretofore filed by the Defendants to the Amended Bill of Complaint and Petition being considered as applying to the second Amended Bill of Complaint and Amended Petition, upon further evidence heard and taken in open Court on the 13th day of September, 1962, and this cause came on further to be heard on the 14th day of September, 1962, upon the Answer of the Defendants, the Board of County Supervisors of Fairfax County, Virginia, to the second Amended Bill of Complaint and Amended Petition, upon the Answer of the Defendant Hugh D. Auchincloss to the second Amended Bill of Complaint and Amended Petition, upon the Cross-Bill of all the Defendants filed by leave of Court without objection, upon the evidence heard and taken in open Court on the 14th and 15th days of September, 1962, and upon the Answers of the Complainants and Petitioners to the Cross-Bill of the Defendants, upon the request of counsel for Petitioners and counsel

for Complainants for additional time to file briefs on the law which requests were denied by the Court, and upon argument by counsel.

Upon due consideration of which, the Court doth ADJUDGE, ORDER AND DECREE that the Demurrers of the Defendants be, and the same are, hereby overruled and the Motions to exclude evidence of the Defendants be, and the same are hereby sustained, and the Court doth further ADJUDGE, ORDER AND DECREE that the relief as prayed for by the Complainants in their second Amended Bill of Complaint and by the Petitioners in their Amended Petition should be denied, and the Court doth further ADJUDGE, ORDER AND DECREE that the second Amended Bill of Complaint and Amended Petition be, and the same are, hereby dismissed.

WHEREUPON counsel for Defendants moved to withdraw the Cross-Bill and Petitioners objected and the Court considering the motion as coming too late doth ADJUDGE, ORDER AND DECREE that the motion be denied, and the Cross-Bill is hereby dismissed the relief requested therein having been provided by dismissing the second amended Bill of Complaint and Amended Petition.

Complainants and Petitioners, by counsel, object and except to the action of the Court in dismissing the second amended bill of complaint, and the amended petition and refusing the relief therein prayed.

AND THIS DECREE IS FINAL.

Enter this 19th day of October, 1962.

(s) Paul E. Brown,
JUDGE.

Entered in Chancery
Order Book No. 81 at
page 624 and Ex.

WE ASK FOR THE ENTRY OF THIS DECREE:

(s) Robert C. Fitzgerald
Robert C. Fitzgerald, Attorney for
Defendants, the Board of County
Supervisors of Fairfax County, Virginia

(s) Lytton H. Gibson
Lytton H. Gibson, Attorney for
Defendant Hugh D. Auchincloss

(s) Frederick T. Gray
Frederick T. Gray, Attorney for
Defendant Hugh D. Auchincloss

SEEN AND OBJECTED TO:

(s) E. A. Prichard
E. A. Prichard, Attorney for
Complainants

J. Sloan Kuykendall, Attorney for
Petitioners

Stilson H. Hall, Attorney for
Petitioners

Timely notice having been given to Counsel for Petitioners of the presentation of this decree and said Counsel not appearing on the date of presentation thereof this decree was entered without their endorsement. PEB 10 19 62

4. Assignments of Error Filed November 14, 1962.

Thomas P. Chapman, Jr.
Clerk of the Circuit
Court of Fairfax County, Va.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN A. BROSS, et al.,

Complainants,

versus

THE BOARD OF COUNTY SUPERVISORS of Fairfax County, et al.,

Defendants.

IN CHANCERY NO. 16912
ASSIGNMENTS OF ERROR

John A. Bross, Joanne B. Bross, Walter T. Ridder, Marie W. Ridder, Evelyn H. Southall, George Southall, Talbot W. Jenkins, Anne C. Jenkins, Edward P. Morgan, Katharine B. Morgan, Michael L. Lejeune, Margaret W. Lejeune, Floydine D. Miscampbell, James Miscampbell, Jr., John W. Hanes, Jr., John R. Bird, W. Ross Rowland, Jr., George Nixon Summers, John C. Laylin, Scott Seegers, Kathleen Seegers, Mollie Ray Carroll, Lewis Marden, Manning Gasch, Joseph H. Bragdon, June H. McKnight, Bonnie Beall Foster and C. B. Wood hereby set forth the following assignments of error:

1. The Court erred in holding the purported rezoning of

the Merrywood tract valid, as it appears from the record that the purported rezoning was based upon improper factors rather than upon the recommendation of the Planning Commission and the evidence adduced at the hearing held by the Board of County Supervisors. The complainants and intervenors and others similarly situated have thus been deprived of the public hearing required by Section 15-847 or Section 15-860 of the Code of Virginia (Michie, 1950), whichever is deemed to apply.

2. The Court erred in approving the attempted rezoning of the Merrywood property which amounted to illegal spot zoning.

3. The Court erred in approving the attempted rezoning of the Merrywood tract because the action of the Board of County Supervisors was arbitrary, capricious and unreasonable in that it bore no substantial relation to the public health, safety, morals and general welfare of the County.

4. The Court erred in upholding the attempted rezoning of the Merrywood property because the effect was to confer a special benefit upon the owners of the Merrywood property denied to complainants and other property owners identically situated and which thus deprived the complainants and other property owners identically situated of the equal protection of the laws and of their property without due process of law in violation of the 14th Amendment to the Constitution of the United States.

5. The Court erred in holding the purported rezoning of the Merrywood tract valid because the effect was to approve the actions of the Board of County Supervisors which defined in the text of the zoning ordinance High rise apartment (RM-2H) zone but neither created such a zone nor

provided standards by which the RM-2H definition might be applied to individual tracts of land. The action of the Board in attempting to creat an RM-2H zone on the Merrywood property was based upon consideration of the Merrywood tract alone rather than upon a comprehensive plan and the RM-2H section of the ordinance is void because it contains no standards governing those applications which will be granted or denied.

6. The Court erred in approving the attempted rezoning of the Merrywood tract because the attempted change of zoning violated the criteria adopted by the Board on September 19, 1960, to govern future apartment zonings, which were in effect and unchanged on April 18, 1962, and on the date of final judgment.

7. The Court erred in denying the relief prayed for because the evidence showed that the Board of County Supervisors failed in the following particulars to comply with the enabling statutes granting to it the power to enact and to amend a zoning ordinance and a zoning map:

(a) The purported amendment to the Fairfax County Zoning Ordinance of April 18, 1962, was adopted by less than the three-fourths affirmative vote required by Section 15-861 of the Code of Virginia (Michie, 1950), a written protest having been filed in accordance with that section.

(b) In attempting to amend the zoning ordinance on April 18, 1962, the Board of County Supervisors failed to direct that the official zoning map of Fairfax County, adopted on September 1, 1959, be changed and as of the date of final judgment no change had been made in the official zoning map.

(c) In attempting to amend the zoning ordinance on April 18, 1962, the Board of County Supervisors failed to comply with the advertising requirements of either Article 2 or Article 3 of Title 15, Chapter 24, Code of Virginia (Michie, 1950). If acting under Article 3 the Board failed to advertise once a week for two successive weeks; if acting under Article 2 the Board failed to state where the text and maps of the proposed amendment might be examined.

(d) Section 30-142 of the Zoning Ordinance of Fairfax County provides that the Board may amend the zoning map by changing any district boundary. The purported rezoning of the Merrywood tract did not constitute a change in a district boundary but rather amounted to the establishment of a new district within an existing residential district and was therefore in violation of said section of the ordinance which to the date of final judgment had not been amended.

8. The Court erred in striking the allegations concerning compliance by property owners with Section 15-861 of the Code of Virginia (Michie, 1950) in such a way as to require a three-fourths vote of the governing body in order to effectuate a change in the zoning ordinance and map and in striking the allegations concerning the removal by Supervisor A. Claiborne Leigh from Fairfax County which vacated his office and rendered nugatory his vote and the motion to rezone made by him.

[List of complainants, their counsel, intervening petitioners and their counsel omitted.]

5. Order Denying Appeal, Dated June 11, 1963.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 11th day of June, 1963.

The petition of John A. Bross, Joanne B. Bross, Walter T. Ridder, Marie W. Ridder, Evelyn H. Southall, George Southall, Talbot W. Jenkins, Anne C. Jenkins, Edward P. Morgan, Katharine B. Morgan, Michael L. Lejeune, Margaret W. Lejeune, Floydine D. Miscampbell, James Miscampbell, Jr., John W. Hanes, Jr., John R. Bird, W. Ross Rowland, Jr., George Nixon Summers, John C. Laylin, Scott Seegers, Kathleen Seegers, Mollie Ray Carroll, Lewis Marden, Manning Gasch, Joseph H. Bragdon, June H. McKnight, Bonnie Beall Foster and C. B. Weed for an appeal from a decree entered by the Circuit Court of Fairfax County on the 19th day of October, 1962, in a certain chancery cause then therein depending, wherein John A. Bross and others were plaintiffs and Board of County Supervisors of Fairfax County and others were defendants, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said circuit court.

6. Order Denying Petition to Rehear, Dated September 11, 1963.

VIRGINIA:

In the Supreme Court of Appeals held at the Masonic Building in the City of Staunton on Wednesday the 11th day of September, 1963.

John A. Bross, et al., Appellants,

against

Board of County Supervisors of Fairfax County, et al., Appellees.

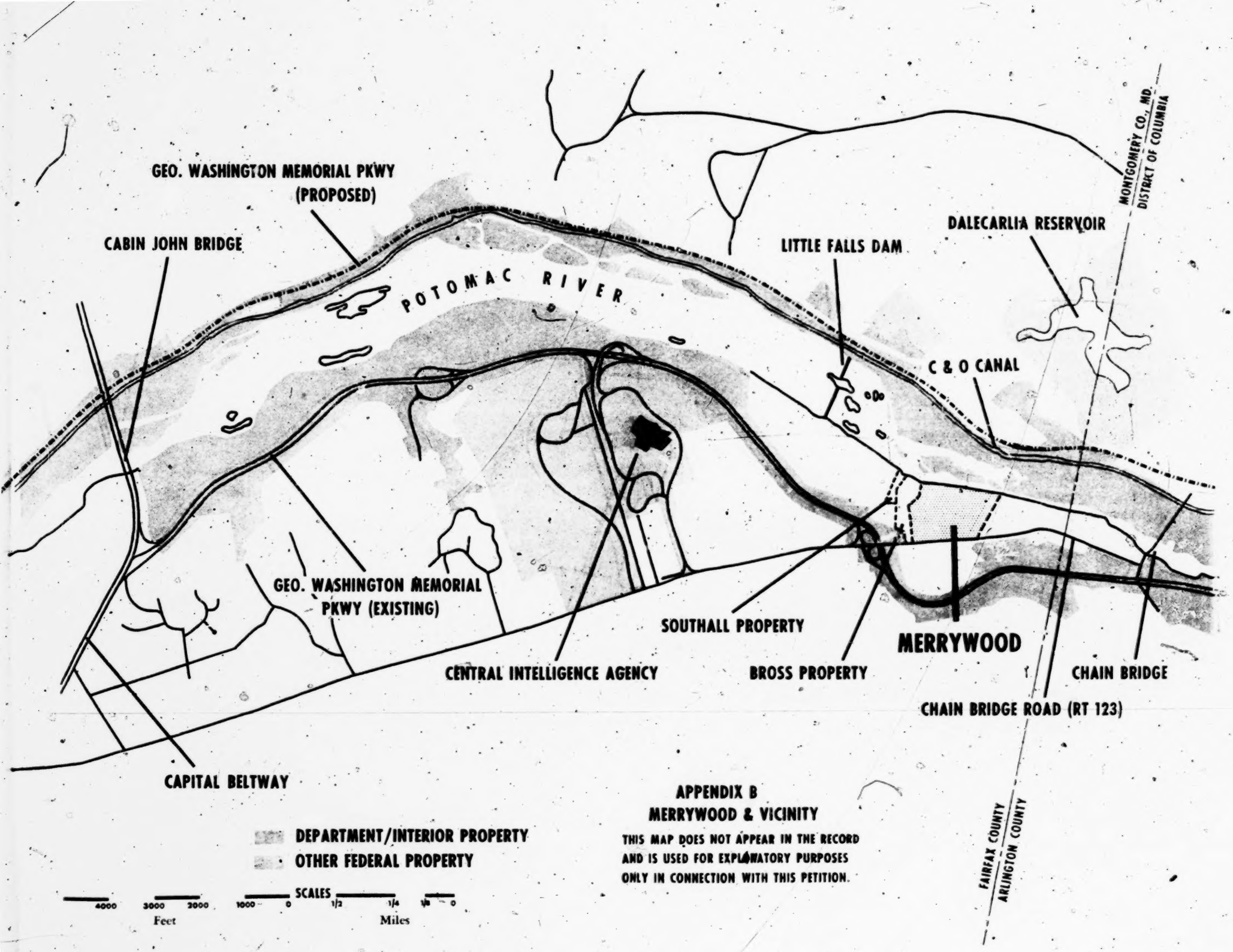
Upon a Petition to Rehear

On mature consideration of the petition of appellants to set aside the decree entered herein on the 11th day of June, 1963, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy, Teste:

(s) H. G. TURNER

Clerk



APPENDIX B
MERRYWOOD & VICINITY

THIS MAP DOES NOT APPEAR IN THE RECORD AND IS USED FOR EXPLANATORY PURPOSES ONLY IN CONNECTION WITH THIS PETITION.

APPENDIX C

STATUTES INVOLVED

Virginia Code Provisions Title 15, Chapter 24
(Michie, 1950)

ARTICLE 2

§ 15-846. *Powers after certification of zoning plan; public hearing; change in plan.*—From and after the time when the county planning commission created in accordance with § 15-916 makes and certifies to the board of supervisors a zoning plan for the unincorporated territory of such county, including both the text of a zoning ordinance and the zoning maps, representing the recommendations of such planning commission for the regulations and districting, then the board of supervisors may by ordinance exercise the powers granted in §§ 15-844 and 15-845. After the preparation by such planning commission of its tenative report, the planning commission shall hold a public hearing thereon before submitting and certifying its final report to the board of supervisors. After receiving such certification from the county planning commission and before the enactment of any such zoning ordinance, the board of supervisors shall hold a public hearing thereon, notice of the time and place of which shall be given by publication at least twice in some newspaper published in the county or having a general circulation therein, the second publication of such notice to be at least fifteen days prior to the holding of the hearing. Such notice shall state the place at which the text and maps as certified by the planning commission may be examined.

No change in or departure from the text or maps as certified by the planning commission shall be made by the board of supervisors unless such change or departure be first submitted to the planning commission for its recommendations as to such change or departure and the plan-

ning commission shall have 30 days from and after such submission within which to report to the board of supervisors. (1938, p. 778; Michie Code 1942, § 2880oo; 1948, p. 1011.)

§ 15-847. *Amendments of zoning ordinances.* —The board of supervisors may from time to time amend the number, shape, boundary, area or any regulation of or within any district or districts or any other provisions of any zoning ordinance, but any such amendment shall not be made or shall not become effective unless the same be first submitted by the board of supervisors to the county planning commission of the county for its recommendation, the report of the planning commission to be made within 30 days after such submission.

The provisions of the previous section relative to public hearings by the board of supervisors and publication of notice thereof, shall apply to all such amendment. (1938, p. 778; Michie Code 1942, § 2880pp.)

Article 3

§ 15-859. *Manner of effecting regulations.*—The board of supervisors of such county shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced and from time to time amended, supplemented or changed. However, no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. Notice shall be given of the time and place of such hearing by publication once a week for two successive weeks prior to its passage in some newspaper published in the county or having

a general circulation therein, the second weekly publication of such notice to be not less than five nor more than ten days prior to the holding of the hearing. (1927, p. 26, Michie Code 1942, § 2880o; 1954, c. 159.)

§ 15-860. *Change of regulations.* —Such regulations, restrictions and boundaries may, from time to time, be amended, supplemented, changed, modified or repealed by a majority vote of the board of supervisors. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments. (1927, p. 27; Michie Code 1942 § 2880p.)

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In The

Supreme Court of the United States

October Term, 1963

No. 668

JOHN A. BROSS, ET AL.,

Petitioners,

v.

BOARD OF COUNTY SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

To the Honorable Chief Justice of The United States and The Associate Justices of The Supreme Court of The United States:

Respondents desire to briefly set forth some of the reasons why the petition for writ of certiorari to review the judgment of the Supreme Court of Appeals of Virginia entered on June 11, 1963, should not be granted.

JURISDICTION

Petitioners have made no attempt to comply with Rule 23 Paragraph 1(b)(iii) in that they have failed to set forth the statutory provision believed to confer jurisdiction on this Court.

Respondents point out that this Court lacks jurisdiction by virtue of the fact that the petitioners are praying for a writ of certiorari to "review the judgment of the Supreme Court of Appeals of Virginia entered on June 11, 1963" (see Petition for a writ of Certiorari, pg. 1) but first made application for the writ on December 9, 1963, more than "ninety days after the entry of such judgment or decree." (U.S.C. Title 28 § 2101 [c]). No application for an extension of time for applying for a writ of certiorari was requested and none was granted. The application was made beyond the time for which an extension could have been granted. (U.S.C. Title 28 § 2101 [c]).

Petitioners apparently rely upon the order of the Supreme Court of Appeals dated September 11, 1963, as the final order from which their time commenced to run, however, it is the order of June 11, 1963, which they seek to have reviewed and the Code of Virginia, 1950, as amended; § 8-470, provides that where a petition for writ of error is rejected on the ground that the order complained of is plainly right, as was the petition for writ of error in this case (see Petition for Writ of Certiorari, Appendix, page 21-A) "no other petition therein shall afterwards be entertained." The Supreme Court of Appeals of Virginia has ruled that the rejection of a petition for writ of error is final (See *Morgan v. Commonwealth*, 115 Va. 943, 79 S.E. 388).

The United States Code sections, the Virginia Code section and the opinion of the Supreme Court of Appeals in the case referred to are set forth in the Appendix hereto.

Failure of petitioners to apply for certiorari within the time prescribed by law divest this Court of jurisdiction. *Toledo Scale Co. v. Computing Scale Co.*, 43 S. Ct. 458, 261 U. S. 399, 67 L. Ed. 719; *Rust Land etc. Co. v. Jackson, Miss.*, 39 S. Ct. 424, 250 U. S. 71, 63 L. Ed. 850.

We do not question the jurisdiction of this Court to decide cases arising under the 14th Amendment, but in addition to failure of petitioners to make timely application no substantial 14th Amendment question is presented by the petition.

STATEMENT OF FACTS

This case was originally tried in the Circuit Court of Fairfax County where the Court heard testimony for almost four days. None of the evidence presented by the respondents there is set forth by the petitioners. They have followed the same pattern in their application for writ of certiorari to this Court that they followed in their petition for writ of error to the Supreme Court of Appeals of Virginia, to-wit, setting forth the evidence in the light most favorable to them and completely ignoring the principle that the trier of the facts having decided the issues against them has resolved the conflicts in the evidence against them.

The record in this case is replete with evidence that the zoning of the Merrywood tract for high-rise apartments was in the best interests of the people of Fairfax County. The testimony of one witness alone, Frederick H. Bair, Jr., a man conceded to be an expert on planning, zoning and economic development, would have been sufficient to justify the Board of Supervisors of Fairfax County in taking the action complained of by the petitioners. Petitioners fail to mention the fact that Mr. Bair testified that the area of which Merrywood is the center is framed by natural barriers with unusual clarity, that the area is set apart from the rest of the county in a way which makes it an "island" for development, that it has strong functional ties with the federal employment complex, that population and economic factors are mounting rapidly and change is inevitable, that the development of the area for residential use as apart-

ments will diminish the traffic loads by moving people nearer their work, that existing and proposed highways and bridges make a concentration of residential population in the Merrywood area logical and desirable, that there are no present plans, federal or state, for use of the area as a park; that single-family use appears impractical and would require excessive clearing, cutting and filling and would destroy the park-like appearance which could be largely retained by high-rise apartments with low land coverage. It was Mr. Bair's conclusion that "logic and equity" suggest that the planning area be zoned for multiple-family development.

The petitioners set forth the fact that the Board of Supervisors have adopted criteria to guide them in the zoning of land for apartments. They fail to point out that there was evidence before the Board of Supervisors and the Court that the Merrywood tract met every one of those criteria.

Contrary to a positive statement in the petition, Mrs. Wilkins did not testify that Supervisor Leigh offered to "swap votes" with her. The only reference to such a statement is taken from a newspaper clipping which it was stipulated could be offered without formal proof but subject to objection for materiality and relevance. The clipping was never offered so that such objections could be raised and ruled upon by the Court. All of the "evidence" regarding Mr. Leigh's bank loan came from this same newspaper clipping which was never formally offered into evidence.

In short, this matter was heard by the Board of Supervisors for at least 6 or 7 hours at which time the proponents of the rezoning presented extensive evidence as to the desirability of rezoning the tract. After hearing that evidence, the Board agreed with its Planning Staff and rezoned the land. The matter was heard in the Circuit Court of Fairfax County for four days at which time that Court heard the evidence and concluded that the Board had ample ground for

its decision and that there was no merit to the contention that petitioners had not had a full and fair hearing on the matter. The Supreme Court of Appeals of Virginia determined that that decision was "plainly right." The evidence in the record fully justifies each of these decisions.

STATEMENT

AS TO WHY THERE IS NO SUFFICIENT REASON FOR THE GRANTING OF A WRIT OF CERTIORARI

I

The Interest of the Federal Government In the Case

None of the petitioners nor their counsel have authority to represent the interest of the Federal Government in pending litigation. That authority is expressly conferred upon the Attorney General of the United States by United States Code, Title 5, Section 310, (Appendix, pg. 2) Under the provisions of that code section, the Attorney General may send the Solicitor General or any officer of the Department of Justice into any court of the United States or of any State to attend to the interests of the United States in any pending litigation. No such action was taken by the Attorney General in this case and it can only be assumed that he properly concluded that there were no federal interests involved in the purely local function of rezoning land in Fairfax County which was privately owned.

Apparently the Federal Authorities have concluded that the actions taken by the County and State officials and Courts are proper for, as petitioners note, the Department of Interior has sought to condemn a scenic easement over the Merrywood tract. If such condemnation is valid, the issues involved in this case are moot.

II

The General Public Interest

Petitioners argue that "even assuming that the rezoning action of Fairfax County when tested only by considerations within its own boundaries would be reasonable exercise of the police power, the general public welfare * * * renders the rezoning an unreasonable use of that power."

In this case, a landowner has been "permitted" to make such use of his property as he desires. No police power had to be resorted to at all. Repeal all the zoning laws, let the police power lie idle and the respondents could go forward. The reasonableness of the use of police power is involved when one is being restricted in some manner—in that event the general public welfare may be sufficient that the "rights" of an individual may be curtailed. In this case no person complains that his rights are limited by the police power and the question of public welfare is not involved. If it were, respondents are aware of no provision of the Constitution divesting the States of power to make the final "public welfare" determination.

III

The Fourteenth Amendment Question

On page 34 of the petition, the petitioners set forth the basis of their claim that this case arises under the Fourteenth Amendment to the Constitution of the United States:

> "Moreover, it is also clear that Respondents have been granted an extremely valuable benefit which has been denied to Petitioners."

There is no evidence in the record to show that there is a single parcel of land in the "Island" identical to "Merrywood." The "Merrywood" tract contains 40.4 acres and can be developed for high-rise apartments in a manner that will preserve the park-like character of the area. The largest other tract in the area shown by the record, is an 11 acre tract owned by Bross. Other tracts are 2.78 acres owned by Southall, 4 1/2 acres owned by Miscamphell and 1 acre owned by Lejune. The size of the tract was a very important consideration in the rezoning. The report of the Planning Staff makes it clear that "Merrywood" is in a different category from the adjacent properties.

> "Thus, we have one of the few remaining sites along the river where advantage of the Potomac water front for residential development may be taken. There is no other land left along the river, either in Arlington, Alexandria or the District of Columbia, available for high-rise, high-rental multi-family development in a setting such as this tract would offer."

In addition to the fact that the "Merrywood" tract is unique, there is no evidence—and indeed the record would rebut the thought—that any other landowner has sought similar action by the Board. Until application is filed and denied, it is too early to cry that equal protection has been denied.

It is a fundamental concept of constitutional law, firmly established, that only a person whose rights have been affected may assail the constitutionality of legislation. The cases supporting that principle are legion.

CONCLUSION

It is respectfully submitted that the application for certiorari comes far too late and that no sufficient reason is shown why this Court should review the actions of the Courts of Virginia as to the rezoning of land in Virginia privately owned.

Respectfully submitted,

FREDERICK T. GRAY
LYTTON H. GIBSON
Counsel for Respondent
Hugh D. Auchinclos

RALPH G. LOUK
Commonwealth Attorney
for Fairfax County, Va.

January 8, 1964

APPENDIX

United States Code—Title 28 Section 2101

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judg-

ment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

United States Code—Title 5 Section 316

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.

Code of Virginia, 1950, As amended, Section 8-476

§ *8-476. Action on petition; finality thereof.*—The court or judge to whom the petition is duly presented, if of opinion that the decision complained of ought to be reviewed, may allow an appeal or writ of error, and in either case may award a supersedeas to stay proceedings in whole or in part. Upon presentation of such petition, either to the court or any judge, counsel for the petitioner shall be afforded, if he so desires, reasonable opportunity to state orally his reason or reasons why such appeal or writ of error should be granted. The petition shall be rejected when it is from an

interlocutory decree or order, if the court or judge to whom it is presented deems it proper that the case should be proceeded in further in the court below before an appeal is allowed therein. If the court shall deem the judgment, decree or order complained of plainly right, and reject the petition on that ground, the order of rejection shall so state, and no other petition therein shall afterwards be entertained. But the rejection of such petition by a judge in vacation shall not prevent the presentation of such petition to the court at its next term.

Morgan v. Commonwealth
115 Va. 943

BY THE COURT.

Morgan was indicted before the circuit court of Wise County for malicious shooting and was sentenced to four years' confinement in the penitentiary. He filed his petition asking for a writ of error from this court, and praying that a new trial be awarded him. This petition was considered by this court at its session in Wytheville on the 16th day of June, 1913, and the court being of opinion that the said judgment was plainly right, refused the said petition and affirmed the judgment. See abstract of judgment of this court filed with the record.

By section 3466 of the Code it is provided, among other things, that when the court of appeals "shall deem the judgment, decree or order complained of plainly right, and shall reject the petition on that ground, and the order of rejection so states, no other petition therein shall afterwards be entertained. But the rejection of such petition by a judge in vacation shall not prevent the presentation of such petition to the court at its next term."

The case before us comes clearly within the operation of the statute. The court, as appears from its order, deemed the judgment complained of plainly right and rejected the petition on that ground, and the order of rejection so states; therefore, this court has no jurisdiction to entertain any other petition with respect to it, and the amended petition presented at this term of court is, for these reasons, rejected.

Refused.

Office-Supreme Court, U.S.
FILED
JAN 15 1964
JOHN F. DAVIS, CLERK

NO. 668

IN THE

Supreme Court
Of the United States

OCTOBER TERM, 1963

JOHN A. BROSS, et al.,
Petitioners,

v.

BOARD OF COUNTY SUPERVISORS
OF FAIRFAX COUNTY, VIRGINIA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court Of the United States

OCTOBER TERM, 1963

NO. 668

JOHN A. BROSS, et al.,

Petitioners,

v.

BOARD OF COUNTY SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

Reference to 28 U.S.C. § 1257(3) was inadvertently omitted from the petition. That sub-section is set forth in the Appendix.

Respondents have contended that the ninety day period within which the petition for certiorari was required to have been filed in this case began to run *not* from the Virginia Supreme Court's denial on September 11, 1963, of the application for rehearing but rather from that court's refusal of the appeal on June 11, 1963. Respondents have cited Virginia Code § 8-476 and *Morgan* v. *Commonwealth*, 115 Va. 943, 79 S.E. 388 (1913), both of which are set forth in the Appendix to Respondents' Brief, to the effect that the rejection of a petition for a writ of error by the Virginia court is final and hence it is from that rejection that the ninety days should run.

This Court has stated:

> A timely petition for rehearing tolls the running of the three-months period because it operates to suspend the finality of the state court's judgment pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1943).

This Court has also stated:

> The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof. *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940).

The Virginia statutes and the practice of the Virginia Supreme Court under those statutes permit the filing of a timely application for rehearing. Va. Code § 8-500 and

Rule 5:13 of the Virginia Supreme Court of Appeals provide for petitions for rehearing. (Both § 8-500 and Rule 5:13 are set forth in full in the Appendix hereto.) In practice, the Virginia Supreme Court has interpreted § 8-476 (cited by Respondents) and § 8-500 together as permitting petitions for rehearing and that Court *does in fact entertain them and pass upon them.*

The order of the Virginia Supreme Court refusing the appeal in this case was entered on June 11, 1963 (see p. 21-A of petition). Under Rule 5:13 Petitioners were required to file an application for rehearing within thirty days after entry of the Court's order. Petitioners so filed their application for rehearing on July 10, 1963, (R. 99-107). However, inasmuch as the Virginia Supreme Court was not scheduled to convene until September 9, 1963, the ninetieth day after June 11, 1963, counsel for Petitioners wrote to the Hon. John W. Eggleston, Chief Justice of the Supreme Court of Appeals of Virginia, in order to obtain a written statement as to whether the Virginia Court construed § 8-500 and Rule 5:13 as permitting application for rehearings on the denial or refusal of a writ of error or appeal. The Chief Justice replied by letter dated August 5, 1963, stating in part:

> While I do not recall any opinion of the court directly passing upon the right of the court to entertain such applications, I may say that we have frequently done so.

(The letter of counsel for Petitioners to the Hon. John W. Eggleston and his reply thereto are set forth in full in the Appendix.)

In fact the Virginia Supreme Court has often reconsidered its action in denying a writ of error and in at least one case has subsequently granted an appeal. *Whitlow v. Altis*, Va. Supreme Court of Appeals, unreported, Doc. No.

4555, writ of error denied October 10, 1955, denial set aside November 25, 1955, appeal granted November 29, 1955.

Thus, the Virginia Court in accordance with Virginia Code §8-500 and Rule 5:13, and despite §8-476, does in fact make a practice of entertaining and passing upon applications for rehearings. It did so in this case. Its order denying the rehearing stated that it had given "mature consideration" to the petition to rehear (P. 22-A of petition). Hence the ninety day period ran from September 11, 1963 and this Court should not dismiss this petition for a writ of certiorari for failure to be filed in a timely fashion.

ARGUMENT

I. THE FOURTEENTH AMENDMENT QUESTION.

On Page 7 of its Brief in Opposition, Respondents contend that Petitioners may not assail the constitutionality of the action of the Board of Supervisors since they have themselves not filed an application for a rezoning of their land for high-rise apartment use. Respondents state ". . . only a person whose rights have been affected may assail the constitutionality of legislation." It is clear from the testimony in the record as cited on Page 30 of the petition and from this Court's opinion in the *Euclid* case also cited on Page 30 of the petition and indeed from common sense, that the use of Merrywood for high-rise apartments seriously affects Petitioners' property rights in the enjoyment of their neighboring land. Petitioners are faced with an unreasonable classification of adjoining land. It would be a travesty to require them to apply to the legislative body for the same unreasonable classification of their own land as a prerequisite to complaining of the unreasonableness of the classification of the adjoining land.

CONCLUSION

It is respectfully submitted that the petition for certiorari was submitted within the time allowed by law and that for the reasons stated herein and in said petition, a writ of certiorari should be granted.

Respectfully submitted:

J. SLOAN KUYKENDALL

E. A. PRICHARD

STILSON H. HALL

CLIVE L. DUVAL, II

RICHARD R. G. HOBSON

Counsel for Petitioners

January 15, 1964.

APPENDIX

1. 28 U.S.C. § 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

2. Virginia Code § 8-500 (Michie 1950, 1957 Replacement Vol.)

§ 8-500. Rehearing.—The Supreme Court of Appeals, on the application of a party, shall rehear and review any case decided by such court if one of the judges who decides the case adversely to the applicant certifies that in his opinion there is good cause for such rehearing; provided, however, that the application or petition for rehearing be filed within thirty days after the entry of the judgment, with the court, if the court be in session, and if not in session, shall be filed with the clerk at the place of session where the judgment was entered, who shall note the date of such filing on the order book. Such rehearing made thereon shall be entered on the order book where it is made and if not and review may be at any place of session, and the judgment, decree, or order made at the place of session where the case was pending at the time it was originally determined, it shall be certified to the clerk of the court at the place of session where the case was originally

pending as aforesaid, who shall forthwith enter the same on his order book and transmit a certified copy thereof to the clerk of the court below, to be by him entered as provided by § 8-498. (Code 1919, § 6372, 1930, p. 869.)

3. Rule 5:13 of the Supreme Court of Appeals of Virginia (Virginia Code Vol. 2, Michie 1950, 1962 Supp. to 1957 Replacement Vol.)

No application for a rehearing will be entertained in any case unless twenty-five copies of a printed petition therefor shall be filed in the clerk's office of this court at Richmond and three copies delivered or mailed to opposing counsel within thirty days after entry of the judgment or decree. A party intending to apply for a rehearing shall give written notice to the clerk of this court within ten days after entry of the judgment or decree. If such notice is given, the clerk of this court shall withhold certification of the mandate until time for filing the application has expired and, if the same is filed, until it is disposed of. No such application to rehear and review any case shall be allowed unless one of the Justices who decided the case adversely to the applicant is of opinion that there is good cause for such rehearing. The proceedings upon such rehearing and review shall be in accordance with Code, § 8-500. No oral argument will be permitted on applications for rehearing.

When a rehearing is granted, the case will be placed on the privileged docket for oral argument. The petitioner may not file any brief in addition to the petition for rehearing. The respondent may file a printed brief in reply to the petition within twenty-one days after the date of the order granting the rehearing, but the respondent will be heard orally whether or not he files such brief. The case will be called at the next session of the court after the expiration of the twenty-one days unless counsel agree that it be called at a session of the court commencing at an earlier time.

4. Letter dated August 2, 1963, from Petitioners' Counsel, J. Sloan Kuykendall, to the Honorable John W. Eggleston, Chief Justice of the Supreme Court of Appeals of Virginia.

August 2, 1963

The Honorable John W. Eggleston
Chief Justice
Supreme Court of Appeals of Virginia
301 City Hall Building
Norfolk 10, Virginia

Re: John A. Bross, et al, Petitioners, v. Board of County Supervisors of Fairfax County, et al, Respondents Our File 6269

Dear Mr. Chief Justice:

On the 10th day of July, 1963, a printed application for a rehearing on the petition for an appeal in this case was filed with the Clerk of the Supreme Court of Appeals. This petition was filed pursuant to Rule 5:13 of the Code.

The respondents in this suit filed a motion to dismiss the application for a rehearing, claiming that the order of the Court rejecting the appeal is final and that no application for a rehearing may be entertained by the Court.

It is our view that the Court does have authority to entertain an application for a rehearing of a petition for appeal and it is our understanding that the Court has heretofore entertained applications for rehearings in such cases.

If the Court refuses to grant a rehearing of our petition for appeal we presently plan to apply to the Supreme Court of the United States for a writ of certiorari. Under the rule of that Court a petition for such a writ must be filed within ninety days from the date a petition for appeal is refused or from the date that the Court refuses to grant a rehearing

on a petition for appeal. If, under the State practice, an application for a rehearing on a petition for appeal may not be entertained by the appellate court of the State, it is then necessary that the petition for a writ of certiorari be filed within ninety days from the date the order is entered denying the appeal.

We understand that your Court will not convene until the 9th of September, in Staunton, and it appears, therefore, that it will be too late to file a petition for a writ of certiorari after the Court passes upon our application for a rehearing, unless the Court has construed Section 8-500 of the Code and Rule 5:13 of the Supreme Court of Appeals as permitting applications for rehearing in cases where appeals and writs of error have been denied.

If you believe it proper at this time to advise counsel for petitioners whether the Supreme Court of Appeals of Virginia has committed itself on this question, I would appreciate it if you will let me hear from you at your earliest convenience.

Respectfully,
(s) J. Sloan Kuykendall
J. SLOAN KUYKENDALL

c

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(Appendix Continued on page 6-A)

5. Letter dated August 5, 1963, from Chief Justice John W. Eggleston to J. Sloan Kuykendall, Counsel for Petitioners.

SUPREME COURT OF APPEALS
OF VIRGINIA

301 City Hall Building
Norfolk, Virginia 23510
August 5, 1963

Honorable J. Sloan Kuykendall
40 Rouss Avenue
Winchester, Virginia

Re: John A. Bross, et al. v. Board of County Supervisors of Fairfax County

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Dear Mr. Kuykendall:

I acknowledge receipt of your letter of August 2 inquiring whether the Supreme Court of Appeals has construed Code, § 8-500 and Rule 13 as permitting applications for rehearing on the denial or refusal of a writ of error or appeal.

While I do not recall any opinion or order of the court directly passing upon the right of the court to entertain such applications, I may say that we have frequently done so.

With best regards,

Sincerely yours,

S John W. Eggleston

JOHN W. EGGLESTON

JWE:W